

No. 10233

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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THOR W. HENRICKSEN, Acting Collector of  
Internal Revenue,

Appellant,

vs.

W. BRAICKS and J. G. MOLZ, Liquidating Trus-  
tees of Pommerelle Company, Inc., a Corpora-  
tion,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division

FILED

OCT 21 1942

PAUL P. O'BRIEN,

CLERK



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Southern Division





## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

|   | Page |
|---|------|
| Answer to Complaint.....  | 13   |
| Appeal:   |      |
| Certificate of Clerk to Transcript of Record on .....                         | 209  |
| Designation of Contents of Record on (DC) .....                               | 204  |
| Designation of Record for Printing (CCA)                                      | 211  |
| Notice of .....   | 46   |
| Order Extending Time to File Record on.                                       | 47   |
| Order Re Depositions and Exhibits attached thereto .....                      | 207  |
| Statement of Points and Designation of Record on (CCA).....                   | 211  |
| Statement of Points (DC).....   | 208  |
| Stipulation for Supplemental Designation of Record for Printing on (CCA)..... | 212  |
| Supplemental Designation of Contents of Record on (DC).....                   | 205  |

| Index   | Page |
|---|------|
| Certificate of Clerk to Transcript of Record on<br>Appeal ..... | 209  |
| Complaint .....   | 2    |
| Exhibit A—Claim for Refund filed April<br>9, 1940 .....         | 8    |
| Conclusions of Law.....   | 40   |
| Designation of Contents of Record on Appeal<br>(DC) .....       | 204  |
| Supplemental .....  | 205  |
| Designation of Record for Printing (CCA)...                     | 211  |
| Stipulation for Supplemental.....                               | 212  |
| Findings of Fact and Conclusions of Law.....                    | 35   |
| Judgment .....  | 43   |
| Stipulation and Order Correcting.....                           | 45   |
| Names and Addresses of Attorneys.....                           | 1    |
| Notice of Appeal.....   | 46   |
| Opinion of the Court.....                                       | 15   |
| Order Correcting Judgment.....                                  | 45   |
| Order Extending time to File Record on<br>Appeal .....          | 47   |
| Order re Depositions and Exhibits attached<br>thereto .....     | 207  |

**Index**

**Page**

|                         |    |
|-------------------------|----|
| Statement of Facts..... | 48 |
|-------------------------|----|

**Exhibits for Plaintiffs:**

|   |     |
|---|-----|
| 1—(Attached to Depositions) Letter addressed to August Buschmann, dated February 16, 1938, from The Pommerelle Company and a letter addressed to August Buschmann, dated February 15, 1938, from The Pommerelle Company ..... | 56  |
| 1—Ninety-day letter addressed to Pommerelle Company, Inc., dated January 16, 1940 from the Commissioner of Internal Revenue....   | 74  |
| 2—Liquidating Statement with list of Stockholders and Liquidating Dividends Distributed to them.....  | 80  |
| 5—Minutes, Subscriptions and Records of Pommerelle Company, Inc. from September 26, 1937, to October 4, 1937, inclusive .....   | 87  |
| 6—Minutes, Subscriptions and Records of The Pommerelle Company, to October 4, 1937.....   | 93  |
| 7—Analysis of Individual Profits on Dissolution Distribution, October 4, 1937, made by Harold L. Scott..  | 129 |

| Index                          | Page |
|--------------------------------|------|
| Witnesses for Plaintiffs:      |      |
| Braicks, L. H.                 |      |
| —direct .....                  | 141  |
| —cross .....                   | 145  |
| —redirect .....                | 148  |
| —recross .....                 | 150  |
| Buschmann, August (Deposition) |      |
| —direct .....                  | 52   |
| —cross .....                   | 60   |
| Huletz, Ed (Deposition)        |      |
| —direct .....                  | 169  |
| —cross .....                   | 172  |
| —redirect .....                | 184  |
| Kroll, Gilbert M. (Deposition) |      |
| —direct .....                  | 186  |
| —cross .....                   | 188  |
| —redirect .....                | 194  |
| Leede, C. S. (Deposition)      |      |
| —direct .....                  | 155  |
| —cross .....                   | 160  |
| Molz, J. G.                    |      |
| —direct .....                  | 84   |
| —cross .....                   | 112  |
| —redirect .....                | 119  |
| —recalled, direct .....        | 150  |

| <b>Index</b>  | <b>Page</b> |
|---|-------------|
| Witnesses for Plaintiffs (Continued):   |             |
| Scott, Harold L.  |             |
| —direct .....   | 121, 131    |
| —cross .....  | 125, 136    |
| Statement of Points and Designation of Record<br>for Printing (CCA) .....     | 211         |
| Statement of Points (DC) .....  | 208         |
| Stipulation and Order Correcting Judgment..                                   | 45          |
| Stipulation for Supplemental Designation of<br>Record for Printing (CCA)..... | 212         |
| Supplemental Designation of Contents of Rec-<br>ord on Appeal (DC).....       | 205         |



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In the District Court of the United States for the  
Western District of Washington, Southern  
Division.

No. 189

W. BRAICKS and J. G. MOLZ, liquidating trustees of POMMERELLE COMPANY, INC., a corporation,

Plaintiff,

vs.

THOR W. HENRICKSEN, Acting Collector of  
Internal Revenue,

Defendant.

### COMPLAINT

Comes now the plaintiff and for its cause of action against the defendant alleges:

#### I.

That the Pommerelle Company, Inc., at all times hereinafter mentioned was a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington; that it was legally dissolved under the laws of the State of Washington on the 8th day of April, 1938; that the plaintiffs, W. Braicks and J. G. Molz, were the duly elected and qualified liquidating trustees of said corporation, this cause of action thereby vesting in them under the laws of the State of Washington. The corporation's principal place of business and the residence of each plaintiff is within the



judicial district of the above-entitled court. Each plaintiff and the said corporation is and was a citizen of the United States and each has at all times borne true allegiance to the government of the United States and each has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States. Plaintiffs are justly entitled to the amount herein claimed from the United States, and no assignment or transfer of this claim, or any part thereof, or any interest therein has been made. [1\*]

## II.

The defendant at all times hereinafter mentioned was and still is the acting Collector of Internal Revenue of the United States for the collection district of Washington, having an office and residing at Tacoma, Pierce County, within the above-entitled district, and the said defendant now is a citizen of the State of Washington, Pierce County therein.

## III.

For the calendar year ending December 31, 1937, the said corporation made a return and paid to the said defendant any and all income and excess-profits taxes due to the defendant or to the United States of America under the provisions of the 1936 Revenue Act.

## IV.

During 1937 and before September 30, 1937, the said corporation employed the firm of Harold L.

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

Scott & Company, Certified Public Accountants, to audit their books and provide professional accounting services necessary to the proper operation and functioning of the business preliminary to the corporate liquidation. The said firm of accountants charged a fee of \$675.00 for the said services, which constituted reasonable compensation for the services rendered and which fee was paid by the corporation. The corporation thereupon reported the said expenses in its income tax return for the said year as a deduction from income, being reasonable and necessary expenses directly related to the corporation's business.

#### V.

A meeting of the stockholders of Pommerelle Company, Inc., duly and properly called, was held in the company's office September 30th, 1937. The stockholders thereupon passed a resolution appointing the plaintiffs herein as trustees to [2] wind up and liquidate the assets and affairs of the said company, the said liquidation to be a voluntary liquidation and dissolution of the corporation out of court in accordance with the laws of the State of Washington. Pursuant to a call issued by the said liquidating trustees in accordance with provisions made at the meeting of the stockholders held on September 30th, a special meeting of stockholders was held on October 4th, 1937. All stockholders of the company were present in person or represented by proxy. The said meeting of October 4th was held subsequent to the liquidation and distribution of the assets and affairs of the corporation made to the

stockholders of record in the amounts herein set forth, namely,

| Stockholder            | Amount of Liquidation |
|------------------------|-----------------------|
| A. Vanderspeck .....   | \$12,284.68           |
| W. Braicks .....       | 10,237.23             |
| J. G. Molz.....        | 8,804.02              |
| Eleanor Cisterer ..... | 7,166.05              |
| August Bushmas .....   | 6,142.34              |
| Fred W. Wonn.....      | 4,094.89              |
| Gilbert Kroll .....    | 2,047.45              |
| J. Tangley .....       | 2,047.45              |
| C. S. Leede.....       | 1,023.72              |
| William D. Leede.....  | 2,047.45              |
| Dorothy Leede .....    | 2,047.45              |
| Eleanor M. Leede.....  | 2,047.45              |
| E. A. Hulitz.....      | 1,433.21              |
|                        | <hr/>                 |
|                        | \$61,423.39           |

A report of the said liquidation and distribution was made by the said trustees to the special meeting of stockholders. A resolution was thereupon unanimously adopted approving the action of the said trustee and the liquidation and distribution of assets accomplished and completed by them.

## VI.

The total sum of the said distribution in liquidation, namely, \$61,423.39, was reported by the corporation in its income tax return for the said year as a dividend paid credit under Section 27 of the 1936 Revenue Act, the stockholders [3] having received their respective shares of the said distribution without restriction and in complete cancellation of all stock owned by them. The Internal Revenue Agent disallowed the said dividend paid credit,

which disallowance resulted in a deficiency assessment in the amount of \$7,187.26 as surtax on undistributed profits under Section 14 of the 1936 Revenue Act.

## VII.

The deduction made by the taxpayer for the expense of employing the firm of Harold L. Scott & Co., Certified Public Accountants, was disallowed by the Internal Revenue Agent, (which disallowance resulted in an additional assessment of excess-profits tax in the amount of \$82.00.

## VIII.

That on or about January 16, 1940, the defendant, acting under the instructions of the Commissioner of Internal Revenue, notified the corporation that it was liable for a further assessment under the provisions of the said section of the said Act in the sum of \$7,346.34 of income taxes and \$144.62 of excess-profits tax, making a total deficiency assessment of \$7,490.96. Thereafter, acting under the authority of the Commissioner of Internal Revenue, the defendant required the plaintiffs, the liquidating trustees, to and thereupon they did pay to the defendant the sum of \$7,490.96 in payment of the said deficiency assessment, and \$918.89 as interest thereon from March 15, 1938. On or about April 9, 1940, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue a claim for refund and repayment of the said amount, a full, true and correct copy of which

claim is hereto attached, marked Exhibit "A" and by reference made a part hereof. No allowance or disallowance of such claim or other action of any nature with regard thereto has been made by the Commissioner of Internal Revenue since the date of filing thereof.

Wherefore, plaintiff prays for judgment against the [4] defendant in the sum of \$8,338.98, together with interest thereon from the 9th day of April, 1940, at the rate of 6% per annum until paid, together with its costs and disbursements herein.

GEORGE KINNEAR,

Counsel for Plaintiff. [5]

## EXHIBIT A

Form 843

Treasury Department  
Internal Revenue Service  
Revised June 1930

## CLAIM

To be Filed With the Collector Where Assessment  
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

Refund of Tax Illegally Collected.

Refund of Amount Paid for Stamps Unused, or  
Used in Error or Excess.

Abatement of Tax Assessed (not applicable to  
estate or income taxes).

Collector's Stamp (Date received)—

State of Washington,  
County of King—ss.

Type or Print

Name of taxpayer or purchaser of stamps—Pommerelle Company, Inc.

Business address—716 Dearborn Street, Seattle,  
Washington.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Tacoma, Washington.

2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1937, to 12/31/, 1937.

3. Character of assessment or tax—Income and excess profits tax.

4. Amount of assessment, — \$7490.96; Int. \$918.89; dates of payment—April 1, 1940.

5. Date stamps were purchased from the Government—

6. Amount to be refunded—\$8409.85.

7. Amount to be abated (not applicable to income or estate taxes)—\$. . . . .

8. The time within which this claim may be legally filed expires, under Section 322(b)(1) I.R.C. on April 1, 1942.

The deponent verily believes that this claim should be allowed for the following reasons:

The above assessment was the result of disallowance by the Commissioner of Internal Revenue of a dividend-paid credit, returned by the taxpayer, in the amount of \$61,423.38, this resulting in the assessment of a surtax on undistributed profits in the sum of \$7187.26.

On or about October 4, 1937, taxpayer distributed in final liquidation of its entire assets, specifically including its current net income, assets in the amount of \$61,423.38, including the amount set forth above, which was returned as a dividend-paid credit. The stockholders of taxpayer received their respective shares of the said distribution without



restriction and in complete cancellation of all stock owned by them.

A portion of the assessment was based upon the disallowance of the deduction of certain expenses totalling \$675.00. These were in their entirety expenses relating to the auditing and similar professional services needed in the winding up and liquidation of the company. They were reasonable and necessary expenses directly related to the business of the taxpayer, and thus deductible.

Sworn to and subscribed before me this 4th day of April 1940.

E. A. NIEMEIER,

Notary Public.

[Signed]

POMMERELLE COMPANY,  
INC.,

By W. BRAICKS,

President.

W. BRAICKS,

Liquidating Trustee.

J. G. MOLZ,

Liquidating Trustee.

(See instructions on reverse side)

### CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: Character of assessment and period covered, List, Year, Month, Account No. or Page, Line, Amount assessed \$. . . . ., Total \$. . . . .



Paid, Abated, or Credited Date, Amount, Total  
\$. . . . .

Claim No.—

I certify that the records of this office show the following facts as to the purchase of stamps:

To whom sold or issued, Kind, Number, Denomination, Date of sale or issue, Amount \$—.

If special tax stamp, state: Serial number, Period commencing—.

-----  
Collector of Internal Revenue.

-----  
(District)

Claim examined by—

-----  
Claim approved by—

-----  
Chief of Division.

Amount claimed.... \$—

Amount allowed.... \$—

Amount rejected.... \$—

Committee on Claims

-----  
-----  
-----  
INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

[Endorsed]: Filed Oct. 22, 1940. [6]

[Title of District Court and Cause.]

## ANSWER

The defendant, in answer to the complaint, alleges as follows:

### FIRST DEFENSE

1. The complaint does not state a claim upon which relief can be granted.

### SECOND DEFENSE

2. Answering Paragraph I of the complaint, defendant admits that the Pommerelle Company, Inc., was a corporation organized under the laws of the State of Washington, that its principal place of business was within the jurisdiction of this Court, but defendant has no knowledge or information sufficient to form a belief of the truth of every other allegation therein and therefore denies every other allegation therein.

3. The defendant admits the allegations of Paragraph II of the complaint.

4. Answering Paragraph III of the complaint, defendant admits that the Pommerelle Company, Inc., filed an income tax return for the period January 1, 1937, to October 4, 1937, indicating therein its income, excess profits and undistributed profits surtax [7] liability for that period, but defendant has no knowledge or information sufficient to form a belief of the truth of every other allegation in said paragraph and therefore denies every other allegation therein.

5. Answering Paragraphs IV and V of the complaint, defendant has no knowledge or information sufficient to form a belief of the truth of the allegations therein and therefore denies every allegation therein.

6. Answering Paragraph VI of the complaint, defendant admits that in the aforesaid income tax return filed by the Pommerelle Company it claimed a dividends paid credit which was disallowed, but defendant has no knowledge or information sufficient to form a belief of the truth of every other allegation therein and therefore denies every other allegation therein.

7. Answering Paragraph VII of the complaint, defendant admits that the claimed deduction stated therein was disallowed, but has no knowledge or information sufficient to form a belief of the truth of every other allegation therein and therefore denies every other allegation therein.

8. Defendant admits the allegations of Paragraph VIII of the complaint.

Wherefore, the defendant respectfully requests that judgment be entered for him dismissing the complaint, and for his costs and disbursements herein.

J. CHARLES DENNIS,  
United States Attorney.

[Endorsed]: Filed Jan. 18, 1941. [8]

[Title of District Court and Cause.]

OPINION OF THE COURT

Jones, & Bronson, Colman Building, Seattle, Wash.,  
Attorneys for Plaintiff.

J. Chas. Dennis, United States Attorney, Seattle,  
Wash.

Harry Sager, Assistant United States Attorney,  
Seattle, Wash.

Thomas R. Winter, Special Assistant to the Chief  
Counsel, Seattle, Wash.  
Attorneys for Defendant.

Schwellenbach, District Judge.

In September, 1937, the directors of Pommerelle Company, Inc., (hereafter called the Old Company) concluded that the stated value of its capital stock was too low and that the corporation was paying excess profits taxes in an amount larger than the company's situation required. For the sole purpose of attempting to correct this situation and on the advice of the corporation's tax counsel, the following plan was devised and effectuated: (1) Proceedings were instituted for the liquidation of the old company. (2) All of the assets of the old company were transferred to plaintiff's as trustees for the stockholders and as liquidating trustees of the company by the declaration of a liquidating dividend. (3) The stockholders of the old company were [9] advised by the company that the receipt on their behalf by the trustees of their proportionate share

in the assets of the old company constituted a dividend subject to tax and every stockholder was advised as to the increase in his income tax resulting from the receipt of such dividend. (4) With one exception, each of the stockholders paid such income tax in accordance with such advice. (The exception was an isolated one and his failure to pay had no connection with the corporation or the plan). (5) Contemporaneous with these transactions, the Pommerelle Company (hereafter called the New Company) was formed. (6) Each stockholder of the Old Company was notified that he was free to choose as to whether or not to enter into the New Company and financial arrangements were made to make possible the purchase for cash from each stockholder of his proportionate share of the assets held for him by the plaintiffs as trustees. (7) Each stockholder subscribed for the stock of the New Company, the stock subscription obligation being payable in cash. (8) The subscribers to the capital stock of the New Company thereupon offered to the New Company that they would cause to be transferred to the New Company all of the assets held for them by the trustees subject to the obligations of the Old Company which the New Company was to agree to pay in fulfillment of their capital stock subscriptions of the New Company. (9) The New Company accepted the offer and stock was issued to the individuals in the same proportionate share as they owned stock in the Old Company. (10) The assets were shown on the books of the New Company as of their net value as shown



on the books of the Old Company. (11) The dissolution of the Old Company was completed.

In making income tax return for the year 1937, plaintiffs, as liquidating trustees, claimed a dividends paid [10] credit under Section 27 (f) of the Revenue Act of 1936, 49 Stat. 1648, on such portion of the amount distributed in liquidation which was properly chargeable to the earnings or profits of the Company accumulated after February 28, 1913. Defendant disallowed this credit. He contended that the foregoing transaction was not a liquidation as contemplated in Section 27 (f) of the Revenue Act of 1936, but was rather a reorganization as defined in Section 112 (g) (1) of the Revenue Act of 1936. He concluded that, since the transaction was a reorganization, it was not subject to a tax because there was no gain or loss which would be recognized under Section 112 of the Revenue Act of 1936. Defendant then concluded that, since there was no gain or loss recognized, the transaction was governed by Section 27 (h) of the Revenue Act of 1936 which provides "if any part of the distribution (including stock dividends and stock rights) is not a taxable dividend in the hands of such of the shareholders as are subject to taxation under this title for the period in which the distribution is made, no dividends paid credit shall be allowed with respect to such part." In support of that position, defendant relies on *Centennial Oil Co. v. Thomas* (CCA 5, 1940) 109 Fed. (2) 359. Defendant contends that the taxes paid by the stockholders of the

Old Company on the liquidating dividends received by them were improperly paid and that, since the real distribution was to the New Company and the New Company was not subject to a tax as the result of the property it received and since subsection (h) of Section 27 of the Revenue Act of 1936 controls subsection (f) of the same section, that the dividends paid credit is not allowable. The undistributed profits tax was levied and paid. This action is for its return.

It should be noted at the outset that the purpose of the levy is to collect taxes imposed by Section 14 (b) of the [11] Revenue Act of 1936 upon the undistributed profits of a corporation. Under that section, the taxes are computed on such portions of the "undistributed net income" as are in excess of certain percentages of the "adjusted net income". The latter phrase is defined as net income less normal income tax and certain specified credits. The phrase "undistributed net income" is defined as "the adjusted net income minus the sum of the dividends paid credit provided in Section 27". It should further be noted that the sole purpose of the entire transaction was to secure an adjustment in the amount of the stated capital used in the business. Defendant does not challenge the propriety of attempting to accomplish this purpose. The testimony also is conclusive that if there was any avoidance of the undistributed profits tax, such avoidance was incidental and in no way may be considered as a motivating factor in the transaction.



There are two questions implicit in the decision of any tax case:

First, whether the mechanism adopted in a particular transaction had as its purpose the evasion of tax liability. I can find nothing ulterior in this transaction. Insofar as the undistributed profits tax is concerned, is isn't necessary here for the tax payers even to rely upon their recognized legal right (*United States v. Isham*, 17 Wall. 496; *Superior Oil Company v. Mississippi*, 280 U. S. 390; *Jones v. Helvering*, 71 Fed. (2d) 214) to decrease the amount of what otherwise would be their taxes by means which the law permits.

Second, the court must attempt to ascertain whether by the transaction the revenue raising ambition of the Congress in imposing the tax has been fulfilled. There can be no doubt from the legislative record that the purpose of Congress in imposing the undistributed profits tax was to increase [12] the revenue either by taxing corporations that failed to distribute their profits to their stockholders or by subjecting the stockholders to higher taxes as the result of forcing the corporate profits into the hands of the stockholders. (See statement of Senator King in charge of the Bill in the Senate, 80 Congressional Record, p. 8647, et seq.; statement of Senators Black and LaFollette in support of the so-called Black-LaFollette substitute, 80 Congressional Record, p. 8526 et seq.; statement of Congressman Doughton, Chairman, Ways and Means Committee, 80 Congressional Record, p. 10269 et

seq.) In the absence of clear and unambiguous language the Court will not deviate from the principle which is necessitated by the declared objective of Congress. *Maguire v. Commissioner*, 313 U. S. 1.

It is true that the argument was made to Congress, largely from outside the Congress, that other collateral benefits of an economic and social nature would accrue from the adoption of the measure; these to come from the increased purchasing power of the dividend-receiving stockholders. While this argument may have had its influence in the adoption of the measure, it was not the Congressional objective. The Congressional intent was limited to the possibility of the 710 million dollar revenue increase discussed by Chairman Doughton. Furthermore, Congress at all times fully recognized that the compelling of the expenditure of dividend moneys received by stockholders in the purchase of consumer goods did not lie within the sphere of legislative enactment. It must, therefore, be realized that the transaction under inspection here fully complied with the legislative purpose for the raising of revenue and that the mechanism used in the transaction was not devised with an ulterior purpose. [13]

Defendant relies upon a large number of cases holding that the courts will strictly scrutinize any corporate transaction which results in the avoiding of the payment of taxes; this for the purpose of seeing whether what results is tax avoidance or tax evasion. Too many cases are cited to justify an analysis of all of them here. They are all cases in

which the taxpayers attempt to evade the payment of taxes or gains resulting from the transfer or sale of corporate assets or securities. They are cases which would be in point here if this action was on behalf of the stockholders for the return of their individual taxes paid on the liquidating dividend from the Old Company and who sought such return on the ground that this was a non-taxable reorganization as defined in Section 112 (g) (1) of the Revenue Act of 1936, or as provided in any of the other subsections of Section 112. For example, in *Minnesota Tea Co. v. Helvering*, 302 U. S. 609, the money received by the corporation was turned over to its stockholders who agreed to pay off the indebtedness of the corporation in an amount equal to the amount which they received. The court held that this was not a distribution to the stockholders under the meaning of Section 112 (d) (1 and 2) of the Revenue Act of 1928, but was a taxable gain received by the corporation. The Supreme Court said:

“Payment of indebtedness, and not distribution of dividends, was, from the beginning, the aim of the understanding with the stockholders and was the end accomplished by carrying that understanding into effect. A given result at the end of a straight path is not made a different result because reached by following a devious path. \* \* \* The relation of the stockholders to the matter was that of a mere conduit.”

In *Gregor v. Helvering*, 293 U. S. 465, the taxpayer was the owner of all of the stock of the original corporation. That corporation held a certain asset which she decided to sell for her individual benefit. For the sole purpose of [14] enabling her to sell this asset and make the profit without paying tax upon the gain, the taxpayer organized a new corporation to which the transfer was made. The Supreme court said:

“But that corporation was nothing more than a contrivance to the end last described. It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function. \* \* \* The whole undertaking, though conducted according to the terms of subdivision (B), was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization and nothing else.”

These two Supreme Court cases are typical of cases upon which defendant relies in dealing with the question of the use of an artificial corporate reorganization for the purpose of avoiding the tax upon the gain realized as a result of the transfer or sale of a capital asset or security. Since the stockholders here are not seeking to avoid payment of the tax upon the gain received by them in the transaction, this group of cases is not in point here.

Typical of the second group of cases in which an effort was made to classify as a reorganization a

mere sale of capital assets by one corporation to another is *Cortland Specialty Co. v. Commissioner*, 60 Fed. (2d) 937). There the consideration was cash paid, promissory notes delivered and a promise to pay additional cash 9 days after the transaction was consummated. The basis for arguing that there was a reorganization was that the second corporation purchased 91½% of the assets of the first. The Circuit Court of Appeals for the Second Circuit said this:

“Section 203 of the Revenue Act of 1926 must be interpreted in this setting. Its purpose was to relieve those interested in corporations of profits taxes in cases where there was only a change in the corporate form in which business was conducted without an actual realization of any gain from an exchange of properties. \* \* \* There can be no justice or propriety in taxing one corporation who transfers its properties for cash and in relieving another that takes part of its pay in short time notes.” [15]

The third group of cases upon which defendant relies are those referring to the relationship between the liquidating trustees and the corporation. Typical of these is *Taylor Oil & Gas Co. v. Commissioner*, 47 Fed. (2) 108. In this case, after a sale of all of the assets of the corporation has been negotiated, it was discovered that such a sale would result in such a profit as would cause a thirty thou-

sand dollar income tax liability to the company. With the sole purpose of avoiding this liability, it was decided to dissolve the company. Liquidating trustees were appointed for the purpose of dissolving the company and winding up its affairs. The court held the case was controlled by the Treasury regulation (Art. 547, Treas. Reg. 45, 1920) which provided:

“The corporate existence is continued for the purpose of liquidating the assets and paying the debts and such receiver or trustees stand in the stead of the corporation for such purposes. Any sales of property by them shall be treated as if made by the corporation for the purpose of ascertaining a gain or loss.”

These cases do not go far as to hold that the trustees may not also be trustees for the individuals who formerly were stockholders if there is a bona fide liquidation with no purpose of evading taxes.

In this case, in order to appraise the validity of defendant's initial position we must determine whether the transaction here involved comes within the definition of reorganization contained in Section 112 (g) (1) of the Revenue Act of 1936. This definition follows:

(1) the term “reorganization” means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock: of



at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation, or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stock- [16] holders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form, or place of organization, however effected.

It requires no discussion to conclude that what we have here is not encompassed by subdivisions (A), (D) or (E). Subdivision (C) is eliminated by the case of *Bondholders Committee, Marlborough Investment Company v. Commissioner*, #128 and #129, October Term, 1941, 314 U. S. . ., in which the Supreme Court said:

“Clause B covers certain transfers ‘by a corporation’ of all or a part of its assets ‘to another corporation’ where the transferor or its stockholders continued in control. These were not ‘properties’ of Marlborough Investment Co. It had long since ceased to own them. It was not the ‘transferor’. \* \* \* The ‘reorganization’ provisions in question cover only inter-corporate transactions”.

Plaintiffs contend that this transaction does not

come within the purview of subsection B for the reason that the acquisition by the New Company was not an exchange solely of all or a part of its voting stock but that there was included the actual consideration of the assumption of the liabilities of the Old Company by the New Company. But, as was pointed out in *Helvering v. Southwest Consolidated Corporation*, #286, October Term, 1941, 314 U. S. . ., Congress, in 1939, amended Clause B by adding: "But in determining whether the exchange is solely for voting stock, the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded." 53 Stat. 871. This amendment was made retroactive as far back as 1924. It was adopted to avoid the consequences of *United States v. Mendler*, 303 U. S. 564.

Plaintiff further contends that this transaction is not covered by B because there is lacking in it the continuity of interest made requisite in the case of *Pinellus Ice & Cold Storage Co. v. Commissioner of Internal Revenue*, 287 U. S. [17] 462. Whether this contention is correct depends upon the meaning of the Supreme Court in the case of *Helvering v. Alabama Asphaltic Limestone Company*, #328, October Term, 1941, 314 U. S. . . . In that case, the Court, speaking through Justice Douglas, stated:

"From the *Pinellas* case, (287 U. S. 462) to the *Le Tulle* Case (308 U. S. 415) it has been recognized that a transaction may not qualify as a "reorganization" under the various rev-



enue acts though the literal language of the statute is satisfied. \* \* \* The Pinellas case introduced the continuity of interest theory to eliminate those transactions which had 'no real semblance to a merger or a consolidation' (287 U. S. p. 470) and to avoid a construction which 'would make evasion of taxation very easy.' "

The sole question decided in the Alabama Limestone case is that the continuity requirements of the Pinellas and the Le Tulle cases are satisfied where the creditors of an insolvent debtor step into the shoes of the stockholders by virtue of invoking the processes of law prior to the actual transfer to the new corporation. It dates the equity ownership of the creditors from the time of the institution of bankruptcy proceedings. The Court took care to emphasize that this conclusion involved no conflict with the principle of the Le Tulle case. It made clear that the "determinative and controlling factors" were the "debtors' insolvency and an effective command by the creditors over the property."

The answer to this particular problem in this case must be found in an analysis of the last paragraph of the Alabama Limestone decision. Here the new company did not receive its assets directly from the old company but from plaintiffs as trustees. Was this break in the chain a mere "transitory phase of an arrangement" which added "nothing of substance to the complete affair"? Was it "no more than" an "intermediate procedural

device utilized to enable the new corporation to acquire all the assets of the old one"? [18] In answering these questions, it is important to note that in using this language, the Supreme Court cites *Gregory v. Helvering*, 293 U. S. 465, and *Helvering v. Bashford*, 302 U. S. 454. In the *Gregory* case, it will be remembered the Court denominated the conveyance as "an elaborate and devious form \* \* \* masquerading as a corporate reorganization." In the *Bashford* case, a temporary ownership of the stock by the intermediary was declared to be not only transitory but also "without real substance".

In the case at bar, the holding of the assets of the Old Company by palintiffs was of brief duration. During that duration, however brief, the persons who were stockholders of the Old Company had an absolute irrevocable right to insist upon receiving their proportionate share of the assets of the Old Company. It is true that no one of them exercised that right. The fact that no one of them exercised the right raises the question of good faith in determining whether their right was something "of substance added to the complete affair". The question of good faith must be resolved in favor of the transaction on the basis of the fact of the payment of income tax by all but one of the old stockholders. This was a positive recognition by each of them that during the interim period they owned their respective interests in the assets formerly owned by the Old Company, not as stockholders in either company but as individuals. That being true, plain-

tiffs transferred the assets not as liquidating trustees of the Old Company but as trustees for the individuals who had been stockholders of the Old Company. Consequently, the continuity requirement is not satisfied and this cannot be classified as a reorganization as defined in the statute.

In his reply brief, largely as a result of suggestions by the Court during oral argument, defendant suggests that the Court should disregard the details of the transaction [19] and consider substance rather than form. He urges that the New Company had the same assets, the same stockholders and the same business as the Old Company and that those assets in excess of paid in capital were not distributed but were still in use by the New Company. He urges that, consequently, the undistributed profits tax should be levied. Such an argument is tempting and attractive. Its attraction comes from its simplicity. Its danger lies in its over-simplification. Discussing a similar argument in the case of *Commissioner v. Sansome*, 60 Fed. (2) 931, Judge Learned Hand said that the courts had beclouded troublesome questions "by recourse to such vague alternatives as 'form' and 'substance', anodynes for the pains of reasoning." I wish to make it clear that defendant's counsel offered the argument only because the court, during oral argument, suggested it and not as a substitute for his very carefully reasoned and well-documented brief.

Even if defendant's position was correct and we were compelled to ignore the distribution to the in-

dividual stockholders of the Old Company and the taxes paid by them thereon, defendant would be confronted with the provisions of subdivision (f) of Section 27 of the Revenue Act of 1936, 49 Stat. 1648, which reads as follows:

“(f). Distribution in Liquidation—In the case of amounts distributed in liquidation, the part of such distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913, shall, for the purposes of computing the dividends paid credit under this section, be treated as a taxable dividend paid.”

Defendants meets this subsection with the argument that it is qualified by subsection (h) of Section 27 of the Revenue Act of 1936 which I have previously quoted. He contends that, since a part of the distribution made in this case is not a taxable dividend in the hands of the New Company for [20] the period in which the distribution was made, no dividend paid credit should be allowed with respect to such part. To reach such a conclusion, it is necessary to find that subsection (h) qualifies or controls subsection (f). This question has been decided adversely to defendant's position in numerous cases by the Board of Tax Appeals. A most complete discussion of the subject is found in the case of *Credit Alliance Corporation v. Commissioner*, 42 B. T. A. 1020. The question has been considered by three of the Circuit Courts of Appeal. In the

first case, *Centennial Oil Co. v. Thomas*, 109 Fed. (2) 359, the Fifth Circuit sustained defendant's position but with a most vigorous dissenting opinion by Judge Hutcheson. On the petition to review the decision of the Board of Tax Appeals in the *Credit Alliance* case, the Circuit Court of Appeals for the Fourth Circuit decided unanimously against defendant's position. *Helvering v. Credit Alliance Corporation*, 122 Fed. (2) 361. The Circuit Court of Appeals for the Second Circuit held likewise in *Commissioner v. Kay Mfg. Corporation*, 122 Fed. (2) 442. It is my duty to accept the weight of authority upon this question. Furthermore, the Supreme Court has granted certiorari in the *Credit Alliance* case and what I may say upon the merits need only be brief. However, in each of the three cases which reached the Circuit Courts there was involved an issue which is not present here. That was the question of the simplification of corporate structure and the relationship between the Message of the President on June 19, 1935 (H. R. Rep. #1681, 74th Cong. 1st Session, p. 4) and the language of the 1936 Act. Because of that, I will state briefly why I think the defendant's position is unsound.

Fundamentally, the difference of opinion involves a conflict between two rules of statutory interpretation. In the various cases, the Commissioner maintained that subsection [21] (h) should be controlling because it came later in the statute than subsection (f). This rule runs head on into another rule to the effect that as between two sections of

the statute that which is the more specific will take precedence over that which is the more general. It is my opinion that the second rule is much more persuasive than the first. There is no sound legislative practice to support the first. A complicated bill cannot be written in one paragraph or one section. There is no reasonable relationship between the position of a section in the statute and its importance. It is an arbitrary rule of construction which has been called artificial and to be resorted to only in extremis. 59 C. J. 1000; *People ex rel Mason v. McLane*, 90 N. Y. 83; *Commercial Trust Co. v. Hudson County, Board of Taxation*, 86 N. J. L. 424; 92 Atlantic 263.

On the other hand, there is a sound reason for the second rule. When the legislature deals with a specific subject, the courts have a right to assume that much more particular and specific care was given then when it deals with a general subject. *United States v. Chase*, 135 U. S. 255; *Rodgers v. United States*, 185 U. S. 83. There can be no doubt that subsection (f) is more specific than subsection (h). It limits its effect to distribution in liquidation and it involves not the entire distribution in liquidation but only a specific part of it. Subsection (h), on the other hand, concerns itself with distributions in general.

To hold that subsection (h) controls subsection (f) would be to hold that subsection (f) merely provides that the distribution be considered a dividend and ignores the words "taxable" and "paid".



Under the rulings of the courts, a distribution in liquidation is not considered a dividend. *Hellmich v. Hellman*, 276 U. S. 233. But by the language of subsection (f), Congress included in the category of divi- [22] dends for the purposes of the Section that which was not previously considered a dividend. Congress further provided that distributions which they included in the category of dividends should be treated "as taxable" and "paid". On this point, it is of interest to note that the inclusion of the word "paid" came as a result of action by the Senate in the form of a committee amendment adopted on the motion of the Committee on Finance of that body. 80 Congressional Record p. 8792. This strengthens the conclusion that it was purposefully inserted.

To me it seems that the most logical interpretation of the relationship between the two subsections is found in the language of the Board of Tax Appeals in the opinion in the Credit Alliance Corporation case when it said :

"In our opinion Congress, by subsection (h) intended to cover dividend distributions and to say that, if taxable, they confer dividends paid credit; and, separately, intended by subsection (f) to cover a different category, towit, distributions in liquidation, and to say that, although not within the category of 'dividends' they shall be treated so as to confer dividends paid credit to the limited degree provided in subsection (f)".

Certainly the Congress intended that subsection (f) should have some meaning which would not be completely nullified and negated by subsection (h). To my mind, this is the only logical interpretation that can give due weight to the congressional intent indicated by the inclusion of both of the subsections.

In addition to the disallowance of the dividends paid credit, defendants disallowed and collected taxes on an item of \$675 for accounting and legal services. This disallowance was on the theory that all of the services rendered were for the reorganization and should properly have been set up in the capital account as organization expense of the New Company. Having held against the defendant upon the question of reorganization and since the services were rendered to the [23] Old Company which went out of existence during the taxable year, these items were properly chargeable to expense and properly deductible as such. In addition to that, the undisputed testimony shows that, of the \$675, \$450 were for ordinary, regular accounting and legal services which had nothing to do with the transaction involved in this case. Under any theory of the case, plaintiffs were entitled to deduct \$450 as a part of the Old Company's ordinary operating expenses.

Findings of fact and judgment may be prepared in accordance with this opinion.

February 14, 1942.

L. B. SCHWELLENBACH

United States District Judge.

[Endorsed]: Filed Feb. 16, 1942. [24]



[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 13th day of January, 1942, before the above-entitled Court, Honorable Lewis B. Schwelmbach presiding therein, sitting without a jury.

Plaintiffs appeared by their attorneys, Jones & Bronson, and were represented in Court by Mr. H. B. Jones and Mr. R. B. Hooper, and the defendant appeared by its attorneys, Mr. J. Charles Dennis and Mr. Frank Hale, United States Attorneys, and was represented in Court by Mr. Thomas S. Winter, Deputy United States Attorney.

Witnesses were sworn and testimony given at the said hearing, and the Court being fully advised in the facts and the law, makes its

## FINDINGS OF FACT

### I.

That the Pommerelle Company, Inc., at all times hereinafter mentioned prior to the 8th day of April, 1938, was a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington; that it was legally dissolved under the laws of the State of Washington on the 8th day of April, 1938; that the plaintiffs, W. Braicks and J. D. Molz were and are the duly elected and qualified liquidating trustees of said corporation, this cause of action thereby vesting in them under

the laws of [25] *under the laws of* the State of Washington. The corporation's principal place of business and the residence of each plaintiff is within the judicial district of the above-entitled court. Each plaintiff and the said corporation is and was a citizen of the United States, and each has at all times borne true allegiance to the government of the United States and neither has in any way voluntarily aided, abetted or given encouragement to rebellion against the United States. No assignment or transfer of this claim, or any part thereof, or any interest therein has been made.

## II.

The defendant at all times hereinafter mentioned was the Acting Collector of Internal Revenue of the United States for the Collection District of Washington, having an office and residing at Tacoma, Pierce County, within the above-entitled district, and the said defendant now is a citizen of the State of Washington, Pierce County therein.

## III.

During 1937 and before September 30, 1937, the said corporation incurred expenses totaling \$675.00 in connection with professional legal and accounting services rendered to it. Of this amount, the sum of \$75.00 was incurred for legal expenses in connection with an increase in the corporation's capital stock; the sum of \$450.00 was paid for ordinary accounting services in connection with the auditing of the books of the corporation; and the sum of \$150.00 represented accounting expenses in connection with the

liquidation of the corporation. The sum of \$675.00 charged for the said services was reasonable and was paid by the corporation, and the corporation reported as a deduction from income in its tax return for the year 1937, the said expenses as reasonably and necessarily incurred in the business of the corporation. This deduction was disallowed by the Internal Revenue Agent [26] which disallowance resulted in an additional assessment of excess profits tax in the amount of \$82.00.

#### IV.

In September, 1937, the directors of Pommerelle Company, Inc., concluded that the stated value of the company's capital stock was too low and that the corporation was paying excess profits taxes in an amount larger than the company's situation required. For the sole purpose of attempting to correct this situation and on the advice of the corporation's tax counsel, proceedings were instituted for the liquidation of the corporation and a resolution was passed duly appointing the plaintiffs herein as trustees to wind up and liquidate the assets and affairs of the said company and to conduct a voluntary liquidation and dissolution out of Court in accordance with the laws of the State of Washington.

#### V.

Pursuant to the resolution, all of the assets of the corporation were transferred to and vested in the plaintiffs as trustees for the stockholders and as liquidating trustees of the company. The stockholders were advised by the company that the receipt

on their behalf by the trustees of their proportionate shares in the assets of the corporation constituted dividends subject to tax and every stockholder was advised as to the increase in his income resulting from the receipt of such dividend. With one immaterial exception, each of the stockholders paid an income tax thereon in accordance with this advice.

## VI.

Contemporaneously with these transactions, a new company was formed under the laws of the State of Washington, called the Pommerelle Company. Each stockholder of the old company was notified that he was free to retain or dispose of his interest in the assets of the old company and to [27] choose whether or not he would enter into the new company. Financial arrangements were made to purchase for cash from any stockholder who did not desire to go into the new company, his proportionate share of the assets held for him by the plaintiffs as trustees. Each stockholder subscribed for the stock of the new company, which subscription obligation was payable in cash. The subscribers to the capital stock of the new company thereupon made an offer to the new company to transfer all of the assets held for them by the trustees, subject to the obligations of the old company, which obligations the new company was to agree to pay, in fulfillment of their capital stock subscriptions to the new company. The new company accepted the offer, the trustees then transferred to it all the assets held by them for the individual stockholders, and stock was issued to the indi-

viduals in the same proportionate share as their interest in the assets of the old company. The assets thereupon appeared on the books of the new company at the net value at which they were shown on the books of the old company.

## VII.

In the income tax return of the old company for 1937 plaintiffs as liquidating trustees, claimed a dividends paid credit under Section 27 (f) of the Revenue Act of 1936, 49 Stat. 1648, equal to that portion of the amount distributed in liquidation which was properly chargeable to the earnings or profits of the company accumulated after February 28, 1913. The Internal Revenue Agent disallowed this credit, which disallowance resulted in a deficiency assessment in the amount of \$7,187.26 as surtax on an undistributed profits under Section 14 of the Revenue Act of 1936. [27a]

## VIII.

On or about January 16, 1940, the defendant, acting under the instruction of the Commisisoner of Internal Revenue, notified the corporation that it was liable for a further assessment under the provisions of Section 14 of the Revenue Act of 1936, in the sum of \$7,346.34 in income taxes and \$144.62 in excess profits tax, making a total deficiency assessment of \$7,490.96. Thereafter, acting under the authority of the Commissioner of Internal Revenue, the defendant required the plaintiffs, as liquidating trustees, to and thereupon they did pay to the de-

fendant the sum of \$7,490.96 in payment of the said deficiency assessment and \$918.89 as interest thereon from March 15, 1938. On or about April 9, 1940, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue a claim for refund and repayment of the said amount. This claim was made and duly filed upon the official form prescribed therefor by the Treasury Department of the United States and was filed within three years after the date of payment of said taxes, and said claim set forth the reasons for and the ground supporting the refund of said taxes. No allowance or disallowance of such claim has been made by the Commissioner of Internal Revenue.

Dated this 21st day of Feb. 1942.

LEWIS B. SCHWELLENBACH

United States District Judge

Presented by:

R. B. HOOPER

Of attorneys for plaintiffs

From the foregoing Findings of Fact, the Court makes and enters the following [28]

## CONCLUSIONS OF LAW

### I.

The plaintiffs have complied with all statutory conditions constituting conditions precedent to the institution and maintenance of this suit.

### II.

The transaction entered into in September, 1937,



by means of which the old Pommerelle Company, Inc., was liquidated and a new company formed was a liquidation within the contemplation of Section 27 (f) of the Revenue Act of 1936 and did not come within the definition of a reorganization as set forth in Section 112 (c) (1) of the Revenue Act of 1936. Under the resolution of liquidation herein the stockholders of the old company, immediately after the declaration of a liquidating dividend, owned their respective interests in the assets formerly owned by the old company, not as stockholders in either company, but as individuals. Thereafter, the transfer by plaintiffs of these assets was made by them as trustees for the individuals who had been stockholders of the old company and not as liquidating trustees of the old company. The continuity requisite for the establishment of a reorganization hence did not exist.

### III.

The plaintiffs were entitled to a dividends paid credit in reporting the income of the old company for the year 1937, to the extent of that amount distributed in the liquidation transaction which was properly chargeable to the earnings or profits accumulated after February 28, 1913, under the provisions of subdivision (f) of Section 27 of the Revenue Act of 1936. In holding and determining that the said dividends paid credit was not allowable and that additional tax was therefore due under Section 14 of the Revenue Act of 1936, [29] the Commissioner of Internal Revenue has exceeded the author-

ity granted him under the Internal Revenue Act of 1936.

#### IV.

The expenses incurred by the taxpayer corporation in 1937 for professional services rendered to it in connection with the increase of its capital stock, the audit of its books for 1937, and the accounting for its liquidation, were properly deductible in full in the taxable year of 1937 as an ordinary and necessary expense incurred in the business of the corporation.

#### V.

Under the evidence and the law, the plaintiffs are entitled to judgment against the defendant in the sum of \$8,338.98 together with interest thereon from the 9th day of April, 1940, at the rate of 6% per annum until paid together with plaintiffs' costs and disbursements as provided by law.

Dated this 21st day of February, 1942.

LEWIS B. SCHWELLENBACH,  
United States District Judge.

Presented by:

R. B. HOOPER

Of Attorneys for Plaintiffs.

[Endorsed]: Filed Feb. 21, 1942. [30]



In the District Court of the United States for the Western District of Washington, Southern Division.

No. 189

W. BRAICKS and J. G. MOLZ, liquidating trustees of POMMERELLE COMPANY, INC., a corporation,

Plaintiffs,

vs.

THOR W. HENRICKSEN, Acting Collector of Internal Revenue,

Defendant.

### JUDGMENT

The above-entitled cause came on regularly for trial on the 13th day of January, 1942, before the above-entitled Court, Honorable Lewis B. Schwellenbach presiding therein, sitting without a jury.

Plaintiffs appeared by their attorneys, Jones & Bronson, and were represented in Court by Mr. H. B. Jones and Mr. R. B. Hooper, and the defendant appeared by its attorneys, Mr. J. Charles Dennis and Mr. Frank Hale, United States Attorneys, and was represented in Court by Mr. Thomas S. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

Witnesses were sworn and testimony given at the said hearing, and the Court being fully advised in the facts and the law, and having made and entered its Findings of Fact and Conclusions of Law herein.

Now, Therefore, it is Ordered, Adjudged and Decreed that plaintiffs have and recover judgment against the defendant in the sum of \$8,338.98, together with plaintiffs' costs and disbursements to be taxed as provided by law, and for the payment of interest provided by law.

Dated this 21st day of Feb., 1942.

LEWIS B. SCHWELLENBACH,  
United States District Judge.

Presented by:

R. B. HOOPER,  
Of Attorneys for Plaintiffs.

Judgment corrected and amended pursuant to Stip. and Order filed May 8, 1942.

E. REDWAYNE,  
Dep. Clerk. [31]

I, Lewis B. Schwellenbach, District Judge of the United States, and sitting in the District Court of the United States for the Western District of Washington, on this 21st day of February, 1942, do hereby certify:

That the acts done by the defendant in the above entitled case, as the Collector of Internal Revenue, in imposing and assessing and exacting and collecting the said excise tax, in the amount of \$8,338.98, as set forth in the foregoing judgment, were done in his official capacity as such Collector of Internal Revenue, and the said Thor W. Henricksen had probable cause for his acts, notwithstanding the fact that all of said tax was erroneously

collected, and judgment has been rendered for a refund thereof in this case.

Dated this 4th day of March, 1942.

LEWIS B. SCHWELLENBACH,  
United States District Judge.

[Endorsed]: Filed Mar. 4, 1942. [32]

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[Title of District Court and Cause.]

STIPULATION AND ORDER CORRECTING  
JUDGMENT

It is hereby stipulated and agreed by and between the plaintiffs, by their attorneys, Jones & Bronson, and defendant, by his attorneys, J. Charles Dennis, United States Attorney for the District of Washington and Thomas R. Winter, Special Assistant to the Chief Counsel for the Bureau of Internal Revenue, that judgment in the above case dated the 21st day of February, 1942, be corrected by striking from said judgment, beginning at Line 25, the words—

“together with interest thereon from the 9th day of April, 1940, to date at the rate of six per cent (6%), in the amount of \$933.97, making a total judgment of \$9,272.95, together with plaintiff's costs and disbursements to be taxed as provided by law, said judgment to bear interest at six per cent (6%) from this date until paid”

and inserting in lieu thereof the words——

“together with plaintiffs’ costs and disbursements to be taxed as provided by law and for the payment of interest as provided by law”.

Dated this 28th day of April, 1942.

JONES & BRONSON,

R. B. HOOPER,

Attorneys for Plaintiffs.

J. CHAS. DENNIS,

THOMAS R. WINTER,

Attorneys for Defendant. [33]

Upon the above stipulation of the parties by their attorneys and good cause appearing therefor, it is hereby Ordered that the judgment be so amended.

Dated this 30 day of April, 1942.

L. B. SCHWELLENBACH,

Judge.

Presented by:

THOMAS R. WINTER.

[Endorsed]: Filed May 8, 1942. [34]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Thor W. Henricksen, Acting Collector of Internal Revenue, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the

final judgment dated the 21st day of February, 1942, and filed in the above-entitled Court on the 4th day of March, 1942, which judgment was corrected by an order dated the 28th day of April, 1942, and filed May 8, 1942.

Dated this 1st day of June, 1942.

J. CHARLES DENNIS,

United States Attorney.

THOMAS R. WINTER,

Special Assistant to the Chief  
Counsel, Bureau of Internal  
Revenue.

Copy mailed to Jones & Bronson, attys. for Pltfs.,  
Colman Bldg., Seattle, June 1, 1942.

E. REDWAYNE,

Dep. Clerk.

[Endorsed]: Filed Jun. 1, 1942. [35]

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[Title of District Court and Cause.]

### ORDER EXTENDING TIME

It is hereby stipulated by and between the defendant appellant, by his attorneys, J. Charles Dennis, United States Attorney for the District of Washington, and Thomas R. Winter, Special Assistant to the Chief Counsel for the Bureau of Internal Revenue, and plaintiffs appellees, by their attorneys, Jones & Bronson, that the time for filing the record on appeal and the docketing of the action shall be extended to a date ninety days from the date of

first notice of appeal, which date was June 1, 1942, and that an order may be entered granting such extension.

/s/ J. CHAS. DENNIS,

United States Attorney.

/s/ THOMAS R. WINTER,

Special Assistant to the Chief  
Counsel Bureau of Internal  
Revenue. Attorneys for De-  
fendant Appellant.

/s/ JONES & BRONSON,

(H. B. JONES),

Attorneys for Plaintiffs Ap-  
pellees.

Approved and so ordered this 6th day of July,  
1942.

/s/ LLOYD L. BLACK,

United States District Judge.

[Endorsed]: Filed Jul. 7, 1942. [36]

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[Title of District Court and Cause.]

### STATEMENT OF FACTS

Be It Remembered, the above-entitled action came on regularly for hearing on this, the 13th day of January, 1942, before the Honorable L. B. Schwel-lenbach, United States District Judge, sitting in Tacoma, Washington;

The plaintiffs herein appeared in person and by

their Counsel, Jones & Bronson, Attorneys-at-Law, Colman Building, Seattle, Washington;

Thomas R. Winter Esq., Special Assistant to the Chief Counsel, Bureau of Internal Revenue, and Harry Sager, Esq., Assistant United States Attorney, appeared for and on behalf of the defendant herein;

Whereupon, the following proceedings were had and testimony taken, to-wit:—[39]

The Court: How about the case of Braicks v. United States of America?

Mr. Winter: The defendant is ready, if the plaintiff is, Your Honor.

Mr. Jones: Yes, the plaintiff is ready in that case.

I anticipated, like Counsel, that we probably wouldn't do more than get through this first case this morning, so I told the witnesses to come this afternoon, but when I saw how we were going, I telephoned and asked them to come right away; however, I am satisfied we can occupy most of the morning with the things we have and then I think we can get through, easily, this afternoon.

This is quite a technical case, as Your Honor may have noted from reading the Brief—that is, the main point in it.

The facts are, roughly, these:

(Makes opening statement for the plaintiffs herein.)

Mr. Winter: (Makes opening statement for the defendant herein.)



It was never intended in this case, Your Honor, to actually liquidate the corporation. If Your Honor has read the depositions, that is very well put by one of the witnesses, when he was asked:

“Q. Did you understand you were selling your stock or not?

“A. No, I wasn’t selling it.” [40]

“Q. You were trading stock in the new corporation?

“A. Yes.

“Q. That was your understanding?

“A. Yes.”

Mr. Jones (Interrupting): The witness had the Notary correct that testimony you read. He said that he either misspoke himself or it was incorrectly reported.

Mr. Winter: That is what he testified to.

I, distinctly, remember it.

Mr. Jones: You notice he has corrections on that point?

Mr. Winter: The copy furnished me had no correction in it.

Mr. Jones (Indicating): This was furnished me this morning.

The Court: Do you want to read these depositions, now?

Mr. Jones: Yes. That might be the best thing to do at this time. I think, if it were agreeable, I think we should submit the depositions and have an opportunity to organize the case during the Noon hour.



I will ask to have the depositions published.

The Court: They may be published.

Counsel may read the depositions.

(Whereupon, the depositions just referred to were published, and read by Counsel herein.)

[41]

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[Title of District Court and Cause.]

DEPOSITIONS OF AUGUST BUSCHMANN,  
C. S. LEEDE, ED HULETZ and GILBERT  
M. KROLL.

Be It Remembered, that heretofore and on to-wit October 23, 1941, at the hour of 3:00 p. m. the depositions of August Buschmann, C. S. Leede, Ed Huletz and Gilbert M. Kroll, were taken on behalf of the plaintiffs at Room 610, Colman Building, Seattle, Washington, before J. W. Greb, Jr., Notary Public, pursuant to oral stipulation;

Plaintiffs appearing by H. B. Jones, Esq., (Messrs. Jones & Bronson), their attorney and counsel;

Defendant appearing by Thomas R. Winter, Esq., Special Attorney, Bureau of Internal Revenue; and [42] Harry Sager, Esq., Assistant U. S. District Attorney;

Whereupon the following proceedings were had:

Mr. Jones: May the record show that the depositions of August Buschmann, C. S. Leede, Ed Huletz and Gilbert M. Kroll, on behalf of the plain-

tiffs, may be taken pursuant to stipulation, for use upon the trial of this Cause?

Is that agreeable to you?

Mr. Winter: Yes, subject, however, to all legal objections.

Mr. Jones: That is right. I will call Mr. Buschmann to be sworn and testify, first.

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### AUGUST BUSCHMANN,

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Jones:

Q. Will you state your name?

A. August Buschmann.

Q. Mr. Buschmann, were you a stockholder in a company known as Pommerelle Company, Inc., in the year 1937?

A. Yes, I was.

Q. I will show you what is entitled a call and waiver of notice of special meeting, which is contained in the Minute Book of the Pommerelle Company, which will be produced upon the trial of this Cause, and which gives notice of a call of a special meeting of the stockhold- [43] ers to be held at the office of the company on September 30, 1937, and call your attention to the signatures there, and ask you if that is your signature where it appears as August Buschmann?

A. Yes, that is my signature.

Q. Did you attend that meeting?

(Deposition of August Buschmann.)

A. Yes, I did.

Q. And, just generally speaking, will you tell us what, as you recall it, was the subject under consideration at that meeting?

Mr. Winter: I don't know if Your Honor wants us to make objections to questions, but certainly that question is leading.

The Court: Was there any stipulation as to objections?

Mr. Winter: We reserved the right——

The Court (Interrupting): Objections to the form of questions should be taken at the time of taking the deposition.

Mr. Jones: This was taken on notice, there wasn't any stipulation.

Mr. Winter (Continuing, from Line 16, above): ——the reporter hasn't put it down—at the time we started the depositions, I said “subject to all legal objections.”

The Court: I will overrule the objection.

Those objections should have been taken specifically at the time of taking of the depositions.

Mr. Winter: That is the reason I made the statement, if the Court please, so we wouldn't interrupt [44] the witness in taking the deposition.

The Court: I will further overrule it, that isn't legal.

Q. And just generally speaking, will you tell us what, as you recall it, was the subject under consideration at that meeting?

(Deposition of August Buschmann.)

A. As I recall it, the subject under consideration was the liquidation of the old Pommerelle Company.

Q. And do you recall whether or not, in connection with the liquidation, there was any discussion as to the rights or the privilege of stockholders of the Company, about whether they could take their liquidated portion in cash or not?

A. There was.

Q. What, in general, was the substance of that discussion?

A. Well, as I recall it, Mr. Braicks, our president, said that if we wanted to sell our stock, why he would be prepared to buy anyone out that wanted to sell their stock.

Q. State whether or not you were subsequently advised by anyone as to the amount of profit you were to report in connection with the transaction?

A. Yes, I was advised.

Q. Did you receive any letters or documents in that connection?

A. I did.

Q. Can you identify those papers?

A. Yes.

Q. What are they?

A. Well, one of them gives an itemized way of figuring [45] our income tax on the basis of the liquidation, and the other one is a letter accompanying the dividend.

Q. How did those come to you?

A. By mail.

(Deposition of August Buschmann.)

Q. And have been in your possession since that time?       A. Yes.

Mr. Jones: I will offer those as Exhibit 1 to this witness's deposition.

Mr. Winter: We will reserve our objection to them.

Mr. Jones: I offer those as Exhibit 1. Those, I presume, are attached to the original deposition and should consist of a general statement, showing the computation of a general statement, showing the computation of taxes, etc. shareholders' profits, etc.

Mr. Winter: We object, if the Court please, on the ground it is self-serving, it is a self-serving document and has no bearing on this case and is contrary to the contention of the defendant that they were, in fact, dividends and that they are self-serving.

The Court: They got a check for some comparatively small amount?

Mr. Jones: I think only a few dollars of adjustments made in some cases, the amounts were just a few dollars, but outside of that, I believe no checks were issued.

The Court: I will overrule the objection.

A letter addressed to the witness, dated February 16, 1938, from The Pommerelle Company, being a detailed statement showing net profit for income tax report; and a letter addressed to the witness, dated February 15, 1938, from The Pommerelle Company, admitted in evidence as Plaintiffs' Exhibit No. 1 to the deposition.

(Deposition of August Buschmann.)

PLAINTIFFS' EXHIBIT No. 1  
TO DEPOSITION

Phone ELiot 0843

Bonded Winery

THE POMMERELLE COMPANY, Inc.

716 Dearborn Street

Wines and Apple Juice

Seattle, Wash.

February 16, 1938

Mr. August Buschmann

Colman Building

Seattle, Washington

Dear Mr. Buschmann:

Enclosed you will find a detailed statement showing net profit for your Federal Income Tax report.

| No. of Shares                |          | Date                               | Cost At                 |
|------------------------------|----------|------------------------------------|-------------------------|
| Purchases                    | Total    | Purchased                          | Par                     |
| 1,000                        |          | 10-21-35                           | 1,000.00                |
| 500                          |          | 6-10-35                            | 500.00                  |
| 1,050                        | 2,550    | 12-14-36                           | 1,050.00                |
| <hr/>                        |          |                                    |                         |
| Distribution<br>Oct. 4, 1937 | Total    | Profit                             | Total                   |
| 2,408.76                     |          | 1,408.76                           |                         |
| 1,204.38                     |          | 704.38                             |                         |
| 2,529.20                     | 6,142.34 | 1,479.20                           | 3,592.34                |
| <hr/>                        |          | <hr/>                              |                         |
| Time Held                    |          | Per Cent of<br>Profit to<br>Report | Net Profit<br>To Report |
| 1 to 2 Years.....            |          | 80                                 | 1,127.01                |
| 2 to 5 Years.....            |          | 60                                 | 422.63                  |
| Under 1 Year.....            |          | 100                                | 1,479.20                |
| <hr/>                        |          |                                    | <hr/>                   |
| Total.....                   |          |                                    | \$3,028.84              |

\$3,028.84

(Deposition of August Buschmann.)

P. S. The check received represents a 5c per share dividend on your 6,143 shares of stock.

Yours very truly,  
THE POMMERELLE COMPANY  
By E. PFISTERER

Copy mailed to Mr. Cowan 2/17/38.

Phone ELiot 0843

Bonded Winery

THE POMMERELLE COMPANY, INC.

716 Dearborn Street

Wines and Apple Juice

Seattle, Wash.

February 15, 1938

Mr. August Buschmann  
Colman Building  
Seattle, Washington

Dear Mr. Buschmann:

Enclosed you will find your dividend check for the year 1937. It will be necessary for you to report a net profit of \$3,028.84 on your Federal Income Tax statement.

Yours very truly,  
TEH POMMERELLE COMPANY  
By E. PFISTERER

[Endorsed]: Filed October 23, 1941.



(Deposition of August Buschmann.)

Q. (By Mr. Jones) State whether or not you filed an income tax return for the year 1937?

A. I did.

Q. And state whether or not you included in that return the profit that you were advised had accrued to you on the liquidation of the Pommerelle Company stock?

Mr. Winter: I object to that on the ground the return is the best evidence of what it included.

Mr. Jones: Counsel is right on that but the reason for this was we had asked for the production of the returns but were advised they could not be produced, except under compulsion or consent and this was laying the foundation to either get the returns, themselves, or, if they weren't available to prove by secondary evidence—and his answer was he did include this in his return. It is not a case of proving the details of the instrument by secondary evidence, just prove the substantive fact, if he did make a return which included this item—whether it is correct, is not so material.

The Court: I will overrule the objection on the basis you will connect it up?

Mr. Jones: Yes, we will.

Q. (Repeating) And state whether or not you included in that return the profit that you were advised had accrued to you on the liquidation of the Pommerelle Company stock? A. I did.

Q. Are you willing for your income tax return



(Deposition of August Buschmann.)

to be produced and submitted to the court in connection with the trial of this cause?      A. Yes.

[47]

Mr. Jones: Do you have his tax return here?

Mr. Winter: I have a photostatic copy of it.

Mr. Jones: Would you be willing to let Mr. Buschmann see it?

Mr. Winter: Yes.

Q. Mr. Buschmann, this photostatic copy of your tax return, which Mr. Winter has produced, and which I assume you will produce at the trial, will you, Mr. Winter?

Mr. Winter: If Mr. Buschmann will consent.

Q. (By Mr. Jones) Yes. Is that a copy of your return and of your signature?

A. I am sorry; I can't tell you whether it is a copy of my return or not, because I can't remember that far back.

Q. Will you look and see whether it purports to be signed by you?

A. Where would the signature be? On the back here?

Mr. Winter: Right here.

The Witness: Yes, that is my signature.

Q. (By Mr. Jones) That is your signature?

A. Yes, sir.

Q. And you are willing that this photostatic copy be produced and exhibited upon the trial of this cause, are you?      A. Surely. Surely.

Q. Have you ever claimed any refund of the

(Deposition of August Buschmann.)

tax paid by you on this return on the profit received from the Pommerelle stock?

A. Not that I know of.

Mr. Jones: That is all. [48]

Cross Examination

By Mr. Winter:

Q. Were you a stockholder, Mr. Buschmann, in Pommerelle Company, Inc. from the time of its organization?

A. You mean the original company?

Q. Yes.

A. Not at the time of its original organization. I bought some stock in the company after it was organized. I don't recall how long it had been organized when I eventually bought.

Q. When did you buy your stock?

A. I think around 1934 or '35, or something like that. I can tell you when I get down to the office exactly, but I don't recall it exactly now.

Q. Did you buy all of your stock at one time, or various times?

A. I think I bought it all at one time.

Q. How many shares of stock did you own on September 30, 1937?

A. I can't tell you exactly the number of shares, but I owned ten percent of the stock in the company.

Q. Ten percent of the stock?

A. Yes. That is my recollection.

Q. I am referring to the date of the meeting

(Deposition of August Buschmann.)

which you have testified about. A. Yes, sir.

Q. What was the reason, Mr. Buschmann, for liquidating the company and forming the new company, if you know?

A. Well, the reason was that the directors of our organization figured it was to the best interests of the [49] stockholders to do so.

Q. Were you a director? A. No, sir.

Q. Was the corporation desirous of changing its calendar year to a fiscal year basis?

A. Whether the directors were desirous?

Q. Yes. A. Well, I suppose they were.

Q. Well, you understood, did you not, Mr. Buschmann, that a new corporation was to be formed, and you were going to get stock in the new corporation for your stock, if you so desired?

A. If we wanted to, yes.

Q. When did you sign your subscription for stock in the new corporation?

A. I can't tell you that.

Q. Well, was it before September 30?

A. Well, I am sorry; I can't tell you that at the present time.

Q. Well, was it before the meeting or after the meeting?

A. When I subscribed for the stock in the new corporation you say?

Q. Yes.

A. It must have been after the meeting, because nobody knew at the time of the meeting

(Deposition of August Buschmann.)

whether we were going to be in the new corporation or not.

Q. Isn't it a fact that on September 25, 1937, you subscribed for the capital stock of the new corporation to be formed, of The Pommerelle Company?      A. Well, I couldn't say.

Q. You couldn't say? [50]

A. No, I couldn't.

Q. You wouldn't say that that was not the fact?

A. I couldn't say, because I don't recall the dates.

Mr. Winter: Do you have the subscriptions, Mr. Jones?

Mr. Jones: I am sure we have.

Mr. Winter: Do you have the subscription books here?

Mr. Jones: That would be the new company?

Mr. Winter: Of the new company.

Mr. Jones: Yes, this is the new company. (Handing a book to Mr. Winter.)

Q. (By Mr. Winter) I will show you, Mr. Buschmann, what purports to be the minutes of the first meeting of stockholders in The Pommerelle Company, held at 716 Dearborn Street, Seattle, which has been furnished by the plaintiffs' counsel. Did you sign that application?

A. I can't tell you whether I did or not.

Q. Did you sign it here?

A. My signature is not here.

Q. Did you attend the meeting, the first meeting?

(Deposition of August Buschmann.)

A. I can't even recall that at the present time.

Q. Well, you did subscribe for the stock, didn't you?

A. Yes, I subscribed. I apparently must have subscribed for the stock.

Q. I beg your pardon?

A. I must have subscribed for the stock, or else I wouldn't have gotten it.

Q. It shows that you are a stockholder of the corporation; [51] it recites that you were there, doesn't it, that you had subscribed?

Mr. Winter: Now, just a minute, gentlemen. If we are going to have a deposition, I would like to have the witness not be coached over there or suggested to.

A. Well, I suppose I was there, but I can't recall this far back whether I was there or not.

Q. When did you first learn about the plan to incorporate the new company?

A. Well, it was talked of, oh, for—I don't know—maybe for a month or two before the time that it was done; but I can't tell you definitely the exact date that it was talked about.

Q. When it was talked about, it was also stated it was desirous of obtaining a higher value for the purpose of Federal capital stock tax, wasn't it?

A. That is possible, yes.

Q. Well, wasn't it a fact, Mr. Buschmann?

A. Well, there were many things talked about.

(Deposition of August Buschmann.)

You see, this is not a corporation that I pay very much attention to. I am only a small stockholder in the corporation, and whatever the directors have——

Q. (Interrupting) You understood, did you not, that this purpose could be accomplished by liquidating the old corporation and forming the new one, and subscribing to the new one?

A. That is true, if you so desired, yes; I think that is right.

Q. Well, you knew you were desirous at that time, didn't you? [52]

Mr. Jones: Desirous of what?

A. Desirous of what did you say?

Q. (By Mr. Winter) I say, you were desirous at that time of getting into the new corporation? You had no intention of selling your stock, did you?

A. I had no intention of selling my stock, no.

Q. And you knew, if a new corporation was to be formed, you were going to subscribe in that?

A. Yes, that is true.

Q. Did you receive any money from the liquidation? A. Well, yes.

Q. I mean outside of this statement here, did you receive any other information with regard to it?

A. Not as far as I can recall at the present time.

Q. I am referring to the letter from the Pommerelle Company by E. Pfisterer, to you, dated February 16, 1938, and letter of February 15, 1938.

(Deposition of August Buschmann.)

A. You mean at that particular time, or before that time, or what?

Q. Well, isn't it a fact, Mr. Buschmann, that prior to September 25, 1937, it was agreed that you would liquidate the assets of the old corporation, and form a new corporation, and turn over the assets to the new corporation the same as it was in the old corporation, except you were increasing your capitalization?

A. I don't think anybody—I don't know about the rest of them, but there wasn't any specific agreement about it.

Q. There was no specific agreement about it?

A. No. [53]

Q. But it was so understood, wasn't it?

A. Well, it was talked about, yes.

Q. Yes. Were you present at the meeting of October 4, 1937, of the new company?

A. I can't recall right now whether I was or not.

Q. Well, did you give your proxy to anyone?

A. I can't recall that either.

Q. Well, during any of that time, did you attend all the meetings, or who did you give your proxies to?

A. I didn't attend all the meetings. Sometimes perhaps I gave proxies to Mr. Braicks and sometimes to Mr. Molz.

Q. What is your business, Mr. Buschmann?

A. Canning salmon.



(Deposition of August Buschmann.)

Q. Did Mr. Braicks tell you that he was prepared to buy anyone out who wanted to get out?

A. He did.

Q. That was understood prior to September 25, 1937, wasn't it?

A. Well, at the time we had the meeting there, whenever the date of that meeting was. I can't recall now.

Q. He was prepared to buy out in September, wasn't he, I mean September 25, 1937?

A. If that was the date of the meeting, that is the time that that was mentioned, yes.

Q. Who did you get the information from about the reorganization or the liquidation of the corporation? Mr. Scott?

A. I think it was discussed by several of the directors before the time it actually took place.

[54]

Q. Was Mr. Scott a director?

A. I don't recall whether he was or not. Were you a director at the time?

Q. Was Mr. Scott present at these meetings?

A. Perhaps at some of them, and some of them he wasn't.

Q. Mr. Scott is the accountant for the corporation, isn't he, was or still is?

A. I don't know whether he still is. He was.

Q. He was at that time? A. Yes.

Q. Did he advise the directors and the stockholders present at the meeting that these purposes

(Deposition of August Buschmann.)

could be accomplished by a liquidation and the formation of a new corporation with a higher capital stock?

Mr. Jones: I think that when you say "these purposes", you ought to specify what purposes you mean, so that the witness will understand.

Q. (By Mr. Winter) Well, did Mr. Scott advise the stockholders in your presence, and you as a stockholder, that the corporation was desirous of changing its calendar year to a fiscal year?

A. Well, I can't recall that.

Q. Well, did he advise you that——

A. (Interrupting) I will tell you in a few short words what I recall. He advised us that this could be done legally.

Q. This could be done legally?

A. Yes, he did.

Q. What could be done legally?

A. This reorganization. If you want to organize a new [55] company, if you want to dissolve the old company and organize a new company, that could be done legally.

Q. Why were you organizing a new one?

A. Because the directors figured it was for the best interests, as I have told you.

Q. To reorganize a new company or form a new company?

A. Not reorganize a new company. Dissolve the old company and organize a new company.

Q. And it could be accomplished by the same

(Deposition of August Buschmann.)

stockholders taking the same interest in the new corporation, is that right?

A. That wasn't the point. We didn't know who were going to be in the new corporation and who weren't.

Q. You didn't know of anyone that didn't want to be in the new corporation, did you?

A. Well, I didn't know the other stockholders.

Q. You didn't know any of them at all?

A. I knew some of them, yes, but I didn't know them all, intimately.

Q. Didn't you sign a subscription for stock?

A. I suppose I did. I don't recall.

Mr. Winter: I make demand on Mr. Jones, do you have a signed subscription for stock?

Mr. Jones: Well, I have only what is in the minute book there.

The Witness: I don't recall whether there was a subscription list or not.

Q. (By Mr. Winter) Calling your attention to the first meeting, the minutes of the first meeting of the stockholders of The Pommerelle Company, wherein it appears [56] that those present, representing the number of shares subscribed for, set opposite their names, were, among others, August Buschmann, 6,000 shares. Now, I will ask you whether or not you subscribed for stock at that time.

Mr. Jones: I suggest you show the witness the minutes you are referring to, so he can tell whether

(Deposition of August Buschmann.)

he knows about it.

The Witness: Did I sign the subscription list here?

Q. (By Mr. Winters) Just answer my question, Mr. Buschmann. You don't know, is that your answer?

A. I don't know if I did. If my name is there as doing so, I suppose I did.

Q. All right.

A. I know I got the stock, so I must have subscribed for it. Whether I signed a written subscription list or not, I can't tell you.

Q. Showing you what purports to be a subscription for common stock of The Pommerelle Company, in the minute books of the new corporation, I will ask you whether or not that is your signature appearing thereon?

A. That is my signature.

Q. Where it appears that you subscribed for 6,143 shares?

A. That is my signature right there, yes, sir.

Q. Well, now, does that refresh your memory? Did you or did you not, on September 25, 1937, subscribe for 6,143 shares?

A. That is my signature there on that document.

Q. That was five days before the new corporation, the [57] First meeting of the new corporation, of the stockholders?

A. I can't say anything as regards to that.

(Deposition of August Buschmann.)

Q. Well, then, as I understand your testimony, Mr. Buschmann, you were advised by the accountant and by others in the corporation that the legal steps could be taken to accomplish the purposes of increasing the capitalization, at least, is that right?

A. Well, they figured that was for the best interests of the corporation. That is the way it was put up to us.

Q. That it was for the best interests of the old corporation?

A. Of the stockholders.

Q. Yes.

A. If the stockholders didn't like it, why whoever wanted to could get out.

Q. Now, just a moment; there is no question before you.

Mr. Jones: That is a part of his answer.

Mr. Winter: I submit that, after three minutes, you can't start answering, volunteering something.

Mr. Jones: It wasn't three minutes, and let the witness answer. If you have anything more you want to add to it, Mr. Buschmann, say so.

Mr. Winter: This next remark is hard to understand. I think it was talk going on between other parties in the room.

Mr. Jones: There were four or five people there.

Mr. Winter: (Reading) The Witness: No, that is all, just that we had the privilege of withdrawing if [58] we wanted to, or we had the privilege of staying in, whichever we liked.

(Deposition of August Buschmann.)

If the Court please, I think that part, the voluntary statement, should not be considered part of the deposition. There was no question before the witness. I don't think the case is going to rise or fall on that, but I think, in all propriety, we will object to the voluntary statement.

Mr. Jones: The last question asked was a very indefinite question. The question was, "That it was for the best interests of the old corporation"? This is continuing along——

Mr. Winter: (Interrupting) According to your suggestion. If you want to add something, say "yes."

The Court: The first answer is voluntary?

Mr. Winter: Yes.

Mr. Jones: Just repetition.

The Court: I will overrule the objection.

Q. (By Mr. Winter) But to your knowledge, no one withdrew?

A. I don't think so. I don't know how many small stockholders there were that did or didn't.

Q. Do you mean to tell me that the officers or directors or Mr. Scott didn't tell you the purpose of the reorganization, or the liquidation and formation of the new corporation? (This question is verbatim from the deposition. Reporter's note)

A. I can't remember all these things four or five years back.

Q. It was discussed two or three months before, is that right? [59]

(Deposition of August Buschmann.)

A. It was discussed some time before, yes.

Q. You knew the corporation was paying high excess profits tax because of the small capitalization, didn't you, or was liable?

A. I didn't pay any particular attention to it. I told you before that I was a small stockholder, and I wasn't paying very much attention to that company. I have told you that once.

Q. Well, tell it to me again, then.

A. All right.

Q. What was the basis which Mr. Braicks advised you that he was prepared to buy anyone out? Upon what basis did he say that?

A. I can't recall the exact basis right now.

Q. Was it so much a share?

A. I think it was on a share basis, yes. I think that is right.

Q. Did you ever dispose of any of your stock, or have you disposed of any of your stock since?

A. No, I have not.

Q. You still are a stockholder in the corporation?

A. Yes, sir.

Mr. Winter: That is all.

Mr. Jones: That is all, Mr. Buschmann.

(Witness excused.)



Mr. Winter: Do you want his return now? We can put them all in at once.

The Court: It is 12:00 o'clock. We will recess until 1:15. Adjournment. [60]

Afternoon Session,  
January 13th, 1942.  
1:15 o'clock.

The Court: You may proceed.

Mr. Jones: Does Your Honor wish me to go ahead with the depositions or shall I start with the more logical end of the case?

The Court: Whichever you prefer.

Mr. Jones: I think I had better take the testimony. These are really cumulative matters.

I will call Mr. Molz.

Mr. Winter, do you have copies of the 90-day letter and plaintiffs' return in this case?

Mr. Winters: I have certified, photostatic copies of each.

Mr. Jones: Do you object to my using a copy?

Mr. Winters: No.

Mr. Jones: For the purpose of showing the basis on which this assessment was made, not proof of the statements contained in it, I offer in evidence Plaintiff's Exhibit No. 1, Certified Copy of the 90-day letter, or assessment letter.

Mr. Winter: No objection.

The Court: Admitted.

(Plaintiffs' exhibit No. 1, the 90-day letter just referred to—Admitted in evidence.)

## PLAINTIFFS' EXHIBIT No. 1

UNITED STATES OF AMERICA

Treasury Department

Washington

February 7, 1941

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of copy of letter dated January 16, 1940 (with statement attached, minus form of waiver mentioned therein), to Pommerelle Company, Inc., Seattle, Washington, from Guy T. Helvering, Commissioner, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal]

S. H. MARKS

Chief Clerk, Treasury  
Department.

S S F J P W H

SN-IT-3

District of Washington

Seattle, Washington

January 16, 1940

350 Federal Office Building  
Seattle Division

IT:90D:JW

Pommerelle Company, Inc.  
716 Dearborn Street  
Seattle, Washington.

Sirs:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1937 discloses a deficiency of \$7,346.34 and that the determination of your excess-profits tax liability for the year mentioned disclosed a deficiency of \$144.62 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward

it to the Internal Revenue Agent in Charge, 350 Federal Office Building, Seattle, Washington. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,  
 GUY T. HELVERING  
 Commissioner.  
 By GEO. C. EARLEY  
 Internal Revenue Agent in  
 Charge.

Enclosures:

Statement.

Form of waiver.

JW-ro

## STATEMENT

IT :90D :JW

POMMERELLE COMPANY, INC.

716 Dearborn Street

Seattle, Washington

Tax Liability for the Taxable Year  
 Ended December 31, 1937

|                         | Liability   | Assessed   | Deficiency |
|-------------------------|-------------|------------|------------|
| Income Tax .....        | \$12,243.93 | \$4,897.59 | \$7,346.34 |
| Excess-profits Tax .... | 3,903.75    | 3,759.13   | 144.62     |
| Total .....             | \$16,147.68 | \$8,656.72 | \$7,490.96 |

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated March 14, 1939; to protest dated April 27, 1939 and to statements made in conferences held August 1, 1939, September 8, 1939, November 27, 1939 and December 7, 1939.

A copy of this letter and statement has been mailed to your representative, H. L. Scott, Insurance Building, Seattle, Washington, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

No taxable dividends having been paid to stockholders during the period January 1 to October 4, 1937, a dividends paid credit is not allowable.

#### ADJUSTMENTS TO NET INCOME

|   |             |
|---|-------------|
| Net income as disclosed by return.....        | \$44,143.08 |
| Unallowable deductions and additional income: |             |
| (a) Cost of improvements.....                 | \$530.16    |
| (b) Organization expenses .....               | 675.00      |
|   | <hr/>       |
| Net income adjusted.....                      | \$45,348.24 |

#### EXPLANATION OF ADJUSTMENTS

(a) The cost of improvements in the amount of \$568.03 less \$37.87 held to be allowable as depreciation on such improvements are disallowed because benefits from the expenditures were not limited to the taxable year.

(b) Expenses incurred in connection with re-

organization, recapitalization or corporate organization are not deductible from net income. Fees paid out in connection with such matters totalling \$675.00 were deducted and are disallowed under the provisions of Article 24-2, Regulations 94.

### COMPUTATION OF TAX

#### Excess-Profits Tax:

|   |             |
|---|-------------|
| Taxable net income.....   | \$45,348.24 |
| Less: 10% of \$102,535.97 value of capital stock<br>as declared in your capital stock tax re-<br>turn for the year ended June 30, 1937..... | 10,253.60   |
| Net income subject to excess-profits tax.....   | \$35,094.64 |
| 5% of declared value of capital stock.....  | 5,126.80    |
| Balance .....   | \$29,967.84 |

#### Excess-profits tax:

|  |             |
|--|-------------|
| 6% of \$5,126.80.....                    | \$ 307.61   |
| 12% of \$29,967.84.....                  | 3,596.14    |
| Total excess-profits tax.....            | \$ 3,903.75 |
| Excess-profits tax assessed:             |             |
| Original—list. Account No. 4-400329..... | 3,759.13    |
| Deficiency—of excess-profits tax.....    | \$ 144.62   |

#### Income Tax

##### Normal Tax:

|   |             |
|---|-------------|
| Taxable net income.....                         | \$45,348.24 |
| Less: Excess-profits tax (paid or accrued)..... | 3,903.75    |
| Net income for normal tax computation.....      | \$41,444.49 |
| Normal tax net income.....                      | \$41,444.49 |
| 8% of \$ 2,000.00.....                          | \$ 160.00   |
| 11% of \$13,000.00.....                         | 1,430.00    |
| 13% of \$25,000.00.....                         | 3,250.00    |
| 15% of \$ 1,444.49.....                         | 216.67      |
| Total normal tax.....                           | \$ 5,056.67 |

Surtax on Undistributed Profits:

|  |             |
|--|-------------|
| Taxable net income.....  | \$45,348.24 |
| Less: Excess profits tax (paid<br>or accrued) .....                                      | \$3,903.75  |
| Normal tax .....   | 5,056.67    |
|  | 8,960.42    |
| Adjusted net income.....   | \$36,387.82 |
| Subject to surtax.....   | \$36,387.82 |
| 7% of \$ 5,000.00.....   | \$ 350.00   |
| 13% of 3,638.78.....   | 436.65      |
| 17% of 7,277.56.....   | 1,237.19    |
| 22% of 7,277.56.....   | 1,601.06    |
| 27% of 13,193.92.....  | 3,562.36    |
| Total surtax .....   | \$ 7,187.26 |
| Normal tax .....   | 5,056.67    |
| Total income tax assessable (normal tax and<br>surtax) .....                             | \$12,243.93 |
| Income tax assessed (normal tax and surtax):<br>Original—list. Account No. 4-400329..... | 4,897.59    |
| Deficiency of income tax.....  | \$ 7,346.34 |

Mr. Jones: I also offer in evidence copy of the [61] return of the Pommerelle Company for the year 1937—certified copy.

Mr. Winter: No objection.

The Court: Admitted.

(Plaintiffs' exhibit No. 2, return of the Pommerelle Company for the year 1937, Admitted in evidence.)









Statement of facts covering the dissolution of Pommerelle Company, Inc., a Corporation.

1. Date of dissolution October 4, 1937.
2. Exact steps taken to dissolve the corporation.
3. Date the distribution was paid to the stockholders October 4, 1937.
4. Name and address of each stockholder at time of dissolution: See attached schedule.

Number and Par Value of Shares of Stock of Each: 25,500 Shares, \$25,500.00.

Amount of money received by each during course of dissolution.....

Amount and return of other Assets Received by each during course of dissolution \$61,423.39

5. List the names and addresses of each individual or corporation other than shareholders and creditors, if any that received assets at dissolution and the amount or value received by each.
6. If any consideration was paid for any of the assets, state the name and address of the individual or corporation making such payments and the exact amount paid by each.
7. If any money or property remains undistributed, state the amount, nature and value of the same and why it has not been distributed. (If additional space is required use separate sheet).

POMMERELLE COMPANY, INC.

(Signature)

W. BRAICKS,

Pres.

## POMMERELLE COMPANY, INC.

## DISTRIBUTION OF CAPITAL AND SURPLUS

At October 4, 1937

| Name and Address of Each<br>Stockholder at Time of<br>Dissolution |         | Number of Shares<br>of Stock of Each | Par Value<br>of Shares<br>of Stock<br>of Each | Value of<br>Assets<br>Received<br>by Each<br>During<br>Dissolution |
|---|---------|--------------------------------------|---|--|
| A. Vanderspek   | Seattle | 5,100                                | \$ 5,100.00                                   | \$12,284.68  |
| W. Braicks  | Seattle | 4,250                                | 4,250.00                                      | 10,237.23  |
| J. G. Molz  | Seattle | 3,655                                | 3,655.00                                      | 8,804.12   |
| Eleanor Pfisterer   | Seattle | 2,975                                | 2,975.00                                      | 7,166.05   |
| August Buschmann  | Seattle | 2,550                                | 2,550.00                                      | 6,142.34   |
| Fred W. Wonn  | Seattle | 1,700                                | 1,700.00                                      | 4,094.87   |
| Gilbert Kroll   | Seattle | 850                                  | 850.00  | 2,047.44   |
| J. Kangley  | Seattle | 850                                  | 850.00  | 2,047.44   |
| C. S. Leede   | Seattle | 425                                  | 425.00  | 1,023.72   |
| Wm. E. Leede  | Seattle | 850                                  | 850.00  | 2,047.43   |
| Dorothy Leede   | Seattle | 850                                  | 850.00  | 2,047.43   |
| Eleanore Leede  | Seattle | 850                                  | 850.00  | 2,047.43   |
| E. A. Hulitz  | Seattle | 595                                  | 595.00  | 1,433.21   |
|   |         | <u>25,500</u>                        | <u>\$25,500.00</u>                            | <u>\$61,423.39</u>   |

Mr. Jones: I think there is nothing about this that becomes of a great deal of significance, unless we have occasion to refer to the figures and computation, except it shows the claim for deduction of the amount distributed, of the dividends paid, and attached to the return there is a liquidating statement which is the ordinary form of liquidation return that is filed, together with the list of the shareholders and amounts distributed to them.

Mr. Winter: There is a claim for refund, Mr. Jones, with the letter of rejection.

Mr. Jones: Yes, for the fiscal year ending October 4, 1937. We might as well put in the claim for refund, if Counsel has no objection, and letter of rejection, as Plaintiffs' Exhibit No. 3.

Mr. Winter: No objection.

The Court: Admitted.

(Plaintiffs' exhibit No. 3, claim for refund and letter of rejection, admitted in evidence, and made a part of the record herein.)

Mr. Winter: We also have the certificate of assessment and payments, Mr. Jones. [62]

Mr. Jones: Well, if you have them there. I don't have that information. Counsel has furnished me with a certified copy of the certificate of assessment and payments, which I will offer as Plaintiffs' exhibit No. 4.

The Court: It may be admitted.

(Plaintiffs' exhibit No. 4, certified copy certificate of assessment and payments, Admitted in evidence.)

Mr. Jones: I also file at this time notice to the plaintiffs asking for the production of certain tax returns which will be called for and produced under our arrangement, as we carry on the case; and, also, a request for admissions which has been answered to the effect that the defendant has no information on which to base an answer. I think that is, substantially, the effect of the answer.

J. G. MOLZ,

called as a witness on behalf of the plaintiffs herein,  
being first duly sworn, testified as follows:

Direct Examination

By Mr. Jones:

Q. Now, Mr. Molz, will you state your name?

A. J. G. Molz.

Q. Do you live in Seattle?           A. I do.

Q. Were you connected with the concern called, originally, "The Malic Company" and subsequently known as "The Pommerelle Co." or "The Pommerelle Company, Inc."?           A. I was. [63]

Q. We will call that afterwards, "the Old Company." And, have you been connected since along in October 1937 with the Pommerelle Company, which is now operating?           A. I have.

Q. In what capacities were you connected with those two companies?

A. At the very beginning I was Secretary and Treasurer and for a short time, I was only Secretary, and at the present time I am Secretary and Treasurer again.

Q. You have been Secretary of each of those companies during their existence, have you?

A. I have.

Q. And are now the Secretary?           A. Yes.

Q. And you have produced here today these two Minute Books which are Minute Books of the Company, is that it?           A. Yes.

Q. Which have been in your custody?



(Testimony of J. G. Molz.)

A. Yes.

Q. Now, what business was the old company engaged in, the Pommerelle?

A. At the very beginning, we decided to produce groceries, and as soon as our prohibition law changed, it was possible for us to enter into the production of wines. At the present time, we produce wines and liquors, both.

Q. Do you recall the steps taken in September and October 1937 with reference to certain steps winding up the old company and forming the new one? I will refer you, specifically, to the Minutes. I will just ask you if you remember that occasion? [64]

A. Yes, I do.

Q. Just tell us what you recall of the purposes and occasion for carrying out that transaction?

A. Our company experienced a rather spectacular growth, since 1934. We, naturally, had to file our financial papers, et cetera, at the bank from time to time and it was decided in due time to increase our capitalization and our declared value also, and, as I recall it, that was one of the prime reasons at the time for liquidating the old company.

Q. Was there any person, in particular, who assumed responsibility for the liquidation, undertook to carry it out?

A. Well, it was explained to our accountant at the time and tax consultant, that we were facing various problems; for instance, the taxes, and naturally, financial problems—because every cent the

(Testimony of J. G. Molz.)

company was making at the time was constantly put back in the inventory, so if we were called upon to meet our obligations, particularly our tax obligations, we had to go to the bank and borrow money.

Q. And who was your accountant that you consulted?

A. Harold Scott & Company.

Q. I show you the Minute Book of the Pommerelle Company, Inc. and ask you if you identify this as the Minute Book of that Company?

A. I do.

Q. I don't know how much of this Counsel may want to refer to. I have submitted the book to Counsel. If it were agreeable, I will just offer the entire book in evidence, with leave to call attention to any pertinent parts. Is that agreeable to you? [65]

Mr. Winter: That is agreeable.

The Court: All right.

Mr. Winter: I made copies, Mr. Jones. I don't believe we kept a copy of that. (Indicating)

Mr. Jones: I don't think so.

Mr. Winter: That is right. That is right.

The Court: Do you offer it, Mr. Jones?

Mr. Jones: Yes, I offer this as ——?

The Clerk: Plaintiffs' exhibit No. 5.

Mr. Winter: We reserve the right to object to matters immaterial to the case, if the Court please.

The Court: All right, subject to that reservation, as you refer to it.

(Testimony of J. G. Molz.)

Mr. Winter: I haven't read it, Your Honor.

(Plaintiffs' Exhibit No. 5, the Minutes just referred to, admitted in evidence.)

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PLAINTIFFS' EXHIBIT No. 5

CALL AND WAIVER OF NOTICE OF SPECIAL MEETING OF STOCKHOLDERS

POMMERELLE COMPANY, INC.,

We, the undersigned stockholders of "Pommerelle Company, Inc.," hereby call a special meeting of stockholders of this company to be held in the main office of the Company on September 30, 1937 at 10:00 A.M., for the purpose of acting on a Resolution for the voluntary dissolution of this company out of court and the appointment of Trustees for the purpose of winding up the affairs of this corporation in manner provided by law for voluntary dissolution of corporations.

We hereby waive all statutory and by-law requirements as to notice of time, place and purpose of said meeting and consent to the transaction of any business properly brought before said meeting.

W. BRAICKS

F. W. WONN

J. G. MOLZ

E. PFISTERER

J. C. KANGLEY

AUGUST BUSCHMANN

A. VANDERSPEK

(Testimony of J. G. Molz.)

E. PFISTERER

G. M. KROLL

C. S. LEEDE

ELEANOR M. LEEDE

DOROTHY LEEDE

WM. E. LEEDE

“MINUTES OF SPECIAL MEETING OF  
STOCKHOLDERS OF ‘POMMERELLE  
COMPANY, INC.,’ SEPTEMBER 30, 1937

“A Special Meeting of Stockholders of ‘Pommerelle Company, Inc.,’ was held in the registered office of the Company in Seattle Washington, September 30, 1937, at 10:00 A.M., pursuant to the foregoing Call and Waiver of Notice, which provided that the principal business to come before said meeting would be a resolution providing for the voluntary dissolution of the company.

“All stockholders appearing on the books of the company and entitled to Notice and to vote at such meeting were present in person or represented by proxy.

“After discussion the following Resolution was duly presented and on proper action unanimously adopted:—

“ ‘Resolved that W. Braicks and J. G. Molz, be and they hereby are appointed as Trustees to wind up and liquidate the assets and affairs of this company and are authorized to execute

(Testimony of J. G. Molz.)

all papers and documents required in connection with the voluntary liquidation and dissolution of this corporation out of Court.'

"The meeting thereupon adjourned subject to call by W. Braicks and J. G. Molz.

J. G. MOLZ

Secretary

Attest

W. BRAICKS

President."

MINUTES OF SPECIAL MEETING OF  
STOCKHOLDERS OF "POMMERELLE  
COMPANY, INC.," HELD OCTOBER 4, 1937

A Special Meeting of Stockholders of "Pommerelle Company Inc., was held in the principal registered office of the company in Seattle, Washington on October 4, 1937 at 10:00 A.M. pursuant to call by W. Braicks and J. G. Molz as provided at the meeting of Stockholders on September 30, 1937.

All stockholders appearing on the books of the company and entitled to notice and to vote at such meeting were present in person or represented by proxy.

W. Braicks and J. G. Molz, appointed at the meeting of September 30, 1937 as Trustees to liquidate and wind up the affairs of the company reported as follows:—

(Testimony of J. G. Molz.)

That they had liquidated the assets and affairs of the company by distributing the same to stockholders of record in undivided portions in the amounts set opposite their names as follows:

| Stockholder              | Amount of Liquidation |
|--------------------------|-----------------------|
| A. Venderspek .....      | \$12,284.68           |
| W. Braicks .....         | 10,237.23             |
| J. G. Molz.....          | 8,804.02              |
| Eleonore Pfisterer ..... | 7,166.05              |
| August Buschmann .....   | 6,142.34              |
| Fred W. Wonn.....        | 4,094.89              |
| Gilbert Kroll .....      | 2,047.45              |
| J. Kangley .....         | 2,047.45              |
| C. S. Leede.....         | 1,023.72              |
| Wm. E. Leede.....        | 2,047.45              |
| Dorothy Leede .....      | 2,047.45              |
| Eleonore M. Leede.....   | 2,047.45              |
| E. A. Hulitz.....        | 1,433.21              |
|                          | <hr/>                 |
|                          | \$61,423.39           |

The following Resolution was thereupon unanimously adopted:

“Resolved that the stockholders of Pommerelle Company, Inc., hereby approve the actions of W. Braicks and J. G. Molz acting as Trustees for the liquidation of the company, and accept their proportionate shares of the assets of said company.”

The meeting thereupon adjourned.

J. G. MOLZ,  
Secretary

Attest

W. BRAICKS,  
President.

(Testimony of J. G. Molz.)

Q. I call your particular attention, Mr. Molz, to the Minutes of the meeting, the special meeting of Stockholders September 30, 1937, at which time the following resolution was adopted: "Resolved that L. H. Braicks and J. G. Molz be and hereby are appointed as trustees to wind up and liquidate the assets and affairs of this Company and are authorized to execute all papers and documents required in connection with the voluntary liquidation and dissolution of this corporation out of Court". Were you one of those trustees named there? A. Yes, I was.

Q. What did you do pursuant to that resolution as trustee?

A. As far as I remember, I executed the terms of the resolution. [66]

Q. In what way, do you remember specifically?

A. I really couldn't give you the details, Mr. Jones; I know we were constantly working with the Company who made up all our reports at the time and he, knowing the purpose—

Mr. Winter (Interrupting): I object to the witness testifying what Mr. Scott knew.

Q. Do you recall the meeting at which the resolution to liquidate was adopted, that I have just read? A. Yes.

Q. State whether or not there was any discussion at that meeting or approximately that time, with regard to who should become stockholders of a new corporation that was to carry on?



(Testimony of J. G. Molz.)

A. No, nothing was said.

Q. There was nothing said at that meeting?

A. No.

Q. Was anything said any time prior to the meeting about that?

A. Not that I know of.

Q. Was there anything said as to the relative—to the possibility of any of the stockholders of the old company disposing of their stock?

A. Well, it was very difficult to talk to all of them——

Mr. Winter (Interrupting): I object to that as not responsive.

Mr. Jones: Well, that was simply preliminary, I think.

A. I can't very well put it all in one sentence; this particular question is rather hard to explain. Some of the stockholders who lived in Seattle were available and [67] they could express their opinions, they were told about the idea we had in mind and, of course, didn't express the idea—possibly they agreed to it; possibly, they didn't. I just happened to be an officer in the company and followed the instructions of the stockholders.

Q. Well, do you recall any discussions with stockholders as to whether or not they might or might not dispose of their stock in the old company and not go into the new?

A. I didn't go so far, no, I didn't discuss those matters with them.

(Testimony of J. G. Molz.)

Q. You didn't discuss those matters with them?

A. No, I didn't.

Q. Now, you recall the steps taken to form the new company, do you?      A. Yes, I do.

Q. And you have identified this, which I will offer as Plaintiff's 6, as the Minute Book of the new company?      A. Right.

Mr. Jones: May we offer it? I will offer it on the same understanding as the Minute Book of the old Company.

Mr. Winter: No objection, except for any matters therein contained which are irrelevant and immaterial.

The Court: It may be admitted with that understanding.

(Plaintiffs' Exhibit 6, the Minute Book just referred to, admitted in evidence.)

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## PLAINTIFF'S EXHIBIT No. 6

### Call and Waiver of Notice of First Meeting of Stockholders

We, the undersigned, being all of the incorporators and subscribers to stock of The Pommerelle Company and representing by our subscriptions more than two thirds of the subscribers to its capital stock entitled to notice of said meeting, do hereby call the First Meeting of Stockholders to be held at 716 Dearborn Street, Seattle, Washington,

(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)  
for the organization of said corporation, election of Directors and transaction of such other business as may properly come before said meeting and hereby waive all requirements as to notice of time, place and purpose of such meeting and consent to the transaction of all business coming before said meeting.

Dated at Seattle, Washington, September 25, 1937.

W. BRAICKS,  
ELEONORE PFISTERER,  
J. G. MOLZ.

### Minutes of First Meeting of Stockholders

The first meeting of incorporators and stockholders of The Pommerelle Company, was held at 716 Dearborn Street, Seattle, Washington at 10:30 A.M. September 25, 1937 pursuant to the foregoing Call and Waiver of Notice.

Those present, representing the number of shares subscribed for set opposite their names were:—

|                          |        |        |
|--------------------------|--------|--------|
| W. Braicks .....         | 10,000 | shares |
| J. Molz .....            | 8,500  | “      |
| Eleonore Pfisterer ..... | 6,000  | “      |
| A. Vanderspek .....      | 12,000 | “      |
| August Buschmann .....   | 6,000  | “      |
| C. S. Leede.....         | 7,000  | “      |

W. Braicks was elected temporary chairman and secretary of the meeting.

(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)

Articles of Incorporation, heretofore filed with the Secretary of State of the State of Washington, and by him approved, were presented and accepted as the Articles of Incorporation and Charter of the corporation.

A proposed code of by-laws were submitted and adopted and ordered incorporated in the records of the company.

A Seal, identified by an impression thereof on the margin hereof was adopted as the Seal of the Corporation.

[Seal]

A corporate book was adopted and is that in which these minutes appear.

The following Resolution was then unanimously adopted:—

“Resolved, that the Directors named in the Articles of Incorporation, namely, W. Braicks, J. Molz and Eleonore Pfisterer, be accepted as the First Board of Directors of the corporation to serve until January 15, 1938 and thereafter until their successors are elected and qualified.”

The following Resolution was then unanimously adopted:—

“Resolved, that the corporation accept and adopt as corporate acts those actions heretofore taken in its name by W. Braicks, J. Molz and Eleonore Pfisterer, in the formation and organization of this corporation.”

(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)

The meeting was thereupon adjourned, subject to call of the President.

W. BRAICKS,

Temporary Chairman and  
Secretary and President  
elect.

Attest:

J. G. MOLZ,

Secretary Elect.

Oath of Office of Directors

State of Washington,  
County of King—ss.

W. Braicks, J. Molz and Eleonore Pfister, being first duly sworn on oath depose and say, each for himself and not one for another:—

That he was elected a Director of The Pommerelle Company, a Washington corporation, and designated in the Articles of Incorporation to hold office for not less than sixty days nor more than six months from date of incorporation, and having been elected to hold office until January 15, 1938, and thereafter until his successor was elected and qualified; that he will faithfully perform all the duties of said office as Director and will uphold and defend the constitution of the United States

(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)  
and of the State of Washington to the best of his  
ability.

W. BRAICKS,  
ELEONORE PFISTERER,  
J. G. MOLZ.

Subscribed and sworn to before me this 25th day  
of September 1937.

[Seal] J. FORSTER,

Notary Public in and for the  
State of Washington, resid-  
ing at Seattle.

### CALL AND WAIVER OF NOTICE OF FIRST MEETING OF DIRECTORS

We, the undersigned, being all of the Directors  
of The Pommerelle Company, a Washington corpo-  
ration, do hereby call the First Meeting of Direc-  
tors to be held at 716 Dearborn Street, Seattle,  
Washington, September 25, 1937 at 11:00 A. M.,  
for the purpose of electing officers and transacting  
any and all business pertaining to the affairs of  
said company and hereby waive all notice as to time,  
place and purpose of such meeting and consent  
thereto.

Dated at Seattle, Washington, September 25,  
1937.

W. BRAICKS,  
ELEONORE PFISTERER,  
J. G. MOLZ.

(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)

### Minutes of First Meeting of Board of Directors

The First meeting of the Board of Directors of The Pommerelle Company was held at 716 Dearborn Street, Seattle, Washington, that being the registered office of said company, at 11:00 A. M. September 25, 1937, pursuant to the foregoing Call and Waiver of Notice.

Directors present:—W. Braicks, J. Molz and Eleonore Pfisterer.

Election of officers was declared the first business of the meeting and the following officers were unanimously elected to hold office until January 15, 1938 and thereafter until their successors are elected and qualified:—

|                      |                    |
|----------------------|--------------------|
| President .....      | W. Braicks         |
| Vice President ..... | Fred W. Wonn       |
| Secretary .....      | J. Molz            |
| Treasurer .....      | Eleonore Pfisterer |

The following Resolution was thereupon unanimously adopted:—

“Resolved, that the officers of this company are hereby authorized and directed to open proper books of account and pay from corporate funds the costs, expenses and fees incurred in the formation and incorporation of this company.”

The following Resolution was thereupon unanimously adopted:—

“Resolved, That W. Braicks, President of The Pommerelle Company be and he is hereby author-



(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)

ized and directed to file with the Federal Alcohol Administration applications for Wine Producers and Blenders Basic Permits to the end that The Pommerelle Company, as successor to Pommerelle Company, Inc., may operate bonded wineries and storerooms in the city of Seattle, Washington, in which to manufacture, store and sell wines made from fruit and fruit juices.”

“The President is further authorized to sign all applications, bonds, and other necessary papers and documents in connection therewith.”

The following Resolution was thereupon unanimously adopted:—

“Resolved, That the President, or the Vice-President, or the Secretary, or the Treasurer of The Pommerelle Company be and they hereby are authorized to execute all applications, bonds, reports and other papers and documents required from time to time by the Alcohol Tax Unit of the Federal Government.”

The meeting was thereupon adjourned, subject to call of the President.

J. G. MOLZ,  
Secretary.

Attest:

W. BRAICKS,  
President.

(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)

Oaths of Office of Officers

State of Washington,

County of King—ss.

W. Braicks, Fred W. Wonn, J. Molz and Eleonore Pfisterer, being first duly sworn, upon oath, each for himself and not one for another, deposes and says: That I am President, Vice President, Secretary, and Treasurer, respectively of The Pommerelle Company, elected September 25, 1937 to hold office until January 15, 1938 and thereafter until my successor is elected and qualified. That I will faithfully perform all the duties of my office and will uphold and defend the Constitution and laws of the United States and of the State of Washington to the best of my ability.

W. BRAICKS,

ELEONORE PFISTERER,

J. G. MOLZ.

Subscribed and sworn to before me this 28th day of September, 1937.

-----  
Notary Public in and for the  
State of Washington, resid-  
ing at Seattle.

Subscription for Common Stock in the  
Pommerelle Company

We, the undersigned, hereby subscribe for the number of shares of common stock in The Pom-

(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)

merelle Company set opposite our signatures. Each share of common stock to have a par value of \$1.00 to be fully paid and non assessable. Subscriptions all to be payable on demand.

|                        | Seattle, Washington. |           |
|------------------------|----------------------|-----------|
|                        | No. of Shares        | Price     |
| W. Braicks .....       | 10,238               | \$10,238. |
| J. Molz .....          | 8,805                | 8,805.    |
| F. W. Wonn.....        | 4,095                | 4,095.    |
| J. C. Kangley.....     | 2,048                | 2,048.    |
| August Buschmann ..... | 6,143                | 6,143.    |
| A. Vanderspek .....    | 12,285               | 12,285.   |
| G. M. Kroll.....       | 2,048                | 2,048.    |
| E. Pfisterer .....     | 7,167                | 7,167.    |
| E. A. Huletz.....      | 1,434                | 1,434.    |
| C. S. Leede.....       | 1,024                | 1,024.    |
| Eleonore M. Leede..... | 2,048                | 2,048.    |
| Dorothy Leede .....    | 2,048                | 2,048.    |
| Wm. Leede .....        | 2,048                | 2,048.    |

Seattle, Washington,  
September 30, 1937.

To: The Board of Directors of "The Pommerelle Company,"

Seattle, Washington.

Gentlemen:

We, the undersigned subscribers for stock in The Pommerelle Company in the amounts set opposite our names, hereby offer to sell, assign, transfer and turn over to The Pommerelle Company in full payment of our individual subscriptions, our undivided ownerships and interests in the assets shown upon

(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)

the attached list, subject to all liabilities, which The Pommerelle Company is to assume and agree to pay.

|                        |        |        |
|------------------------|--------|--------|
| W. Braicks .....       | 10,238 | Shares |
| F. W. Wonn.....        | 4,905  |        |
| J. G. Molz.....        | 8,805  |        |
| E. Pfisterer .....     | 7,167  |        |
| J. C. Kangley.....     | 2,048  |        |
| August Buschmann ..... | 6,143  |        |
| A. Vanderspek .....    | 12,285 |        |
| E. Pfisterer .....     | 7,167  |        |
| G. M. Kroll.....       | 2,048  |        |
| C. S. Leede.....       | 1,024  |        |
| Elconore M. Leede..... | 2,048  |        |
| Dorothy Leede .....    | 2,048  |        |
| Wm. E. Leede.....      | 2,048  |        |
| E. A. Huletz.....      | 1,434  |        |

## POMMERELLE COMPANY, INC.

## ASSETS

October 4, 1937

## Current Assets

|                                       |           |
|---------------------------------------|-----------|
| Cash in National Bank of Commerce..\$ | 344.12    |
| Cash in Seattle-First National Bank.. | 728.38    |
| Accounts Receivable .....             | 10,094.73 |

## Inventories:

|                         |             |
|-------------------------|-------------|
| Finished Products ..... | \$ 4,558.19 |
| Goods in Process.....   | 25,347.64   |
| Raw Materials .....     | 32,024.44   |
| Supplies .....          | 531.42      |
| Revenue Stamps .....    | 1,020.85    |
|                         | 63,482.54   |

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Total Current Assets..... \$ 74,649.77

(Testimony of J. G. Molz.)

## Plaintiff's Exhibit No. 6—(Continued)

## Fixed Assets

|   |           |           |
|---|-----------|-----------|
| Land .....                              |           | 3,696.22  |
| Building .....                          | 22,451.12 |           |
| Less: Reserve for<br>Depreciation ..... | 636.33    | 21,814.79 |

Machinery and Equipment 6,363.79

|   |          |          |
|---|----------|----------|
| Less: Reserve for<br>Depreciation ..... | 1,407.91 | 4,955.88 |
|---|----------|----------|

Tanks and Puncheons..... 4,918.15

|   |        |          |
|---|--------|----------|
| Less: Reserve for<br>Depreciation ..... | 571.77 | 4,346.38 |
|---|--------|----------|

Delivery Equipment ..... 2,146.84

|   |       |          |
|---|-------|----------|
| Less: Reserve for<br>Depreciation ..... | 86.08 | 2,060.83 |
|---|-------|----------|

Furniture and Fixtures.. 843.04

|   |       |          |
|---|-------|----------|
| Less: Reserve for<br>Depreciation ..... | 86.01 | 2,060.83 |
|---|-------|----------|

|                         |           |
|-------------------------|-----------|
| Total Fixed Assets..... | 37,695.62 |
|-------------------------|-----------|

## Other Assets

|                                     |        |
|-------------------------------------|--------|
| Stock Subscriptions Receivable..... | 630.15 |
|-------------------------------------|--------|

## Deferred Charges to Operations

|                               |        |
|-------------------------------|--------|
| Lease Deposit .....           | 50.00  |
| Interest Paid In Advance..... | 156.95 |
| Rent Paid in Advance.....     | 217.74 |
| Prepaid Insurance .....       | 215.60 |

|   |        |
|---|--------|
| Total Deferred Charges to Operations..... | 640.29 |
|---|--------|

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\$113,615.83

(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)

## POMMERELLE COMPANY, INC.

## LIABILITIES

October 4, 1937

## Current Liabilities

|   |             |
|---|-------------|
| Notes Payable—Bank .....                        | \$15,500.00 |
| Accounts Payable .....                          | 2,581.43    |
| Accrued Federal Income Tax.....                 | 9,106.72    |
| Accrued Salaries and Wages.....                 | 1,109.28    |
| Accrued Interest Payable.....                   | 388.36      |
| Accrued Old Age Benefits.....                   | 54.73       |
| Accrued Federal Unemployment<br>Insurance ..... | 23.16       |
| Accrued State Unemployment<br>Insurance .....   | 50.33       |
| Accrued State Business Tax.....                 | 51.65       |
| Accrued Real Estate Taxes.....                  | 343.93      |
| Accrued Personal Property Taxes.....            | 452.41      |

|                                |             |
|--------------------------------|-------------|
| Total Current Liabilities..... | \$29,662.00 |
|--------------------------------|-------------|

## Long Term Liabilities

|                                   |           |
|-----------------------------------|-----------|
| Real Estate Contract Payable..... | 22,500.00 |
|-----------------------------------|-----------|

## Other Liabilities

|                      |       |
|----------------------|-------|
| Christmas Fund ..... | 30.44 |
|----------------------|-------|

|                         |             |
|-------------------------|-------------|
| Total Liabilities ..... | \$52,192.44 |
|-------------------------|-------------|

|                    |              |
|--------------------|--------------|
| Total Assets ..... | \$113,615.83 |
|--------------------|--------------|

|                         |           |
|-------------------------|-----------|
| Total Liabilities ..... | 52,192.44 |
|-------------------------|-----------|

|  |              |
|--|--------------|
| Excess of Assets Over Liabilities..... | \$ 61,423.39 |
|--|--------------|

Call and Waiver of Notice of Special Meeting of  
Directors of The Pommerelle Company, Octo-  
ber 4, 1937.

We, the undersigned Directors of The Pomme-  
relle Company, a Washington corporation, hereby

(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)

call a Special Meeting of the Board of Directors of said company to be held on October 4, 1937 at the Registered office of the company in Seattle, at 10:30 A. M. for the purpose of acting on the purchase of certain goods, wares, merchandise, machinery, equipment and assets for use of the company in conducting the business for which this company was formed. We hereby waive all statutory and by-law requirements as to notice of time, place and purpose of the meeting and consent to the transaction of business coming before said meeting.

W. BRAICKS,

J. G. MOLZ.

E. PFISTERER.

Minutes of Special Meeting of Directors of the The  
Pommerelle Company October 4, 1937

A Special meeting of the Board of Directors of this company was held at 10:30 A. M. October 4, 1937 at the registered office of the company, pursuant to the foregoing Call and Waiver of Notice.

Present were: W. Braicks, J. G. Molz, and Eleonore Pfisterer.

The first matter brought before the meeting was the offer of certain individuals to sell assets, subject to liabilities as shown by the statement of assets and liabilities attached to said offer. After consideration the following Resolution was unanimously adopted:—



(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)

“Resolved that this company accept the offer dated October 4, 1937, executed by a number of individuals, and purchase the assets, subject to the liabilities as shown by the statement of assets and liabilities attached to said offer, at the full purchase price of \$61,423.39 and that said purchase price be fully paid by applying the amounts set opposite the names of each individual executing said offer upon the payment of their respective subscriptions for stock in this company as follows:

| Subscriber               | Value of Assets   | Cash to Be Paid<br>by Subscriber | Par Value of<br>Shares to Issue |
|--------------------------|-------------------|----------------------------------|---------------------------------|
| A. Vanderspek .....      | \$12,284.68       | \$ .32                           | \$12,285.00                     |
| W. Braicks .....         | 10,237.23         | .77                              | 10,238.00                       |
| J. G. Molz.....          | 8,804.02          | .98                              | 8,805.00                        |
| Eleonore Pfisterer ..... | 7,166.05          | .95                              | 7,167.00                        |
| August Buschmann .....   | 6,142.34          | .66                              | 6,143.00                        |
| Fred W. Wonn.....        | 4,094.89          | .11                              | 4,095.00                        |
| Gilbert Kroll .....      | 2,047.45          | .55                              | 2,048.00                        |
| J. Kangley .....         | 2,047.45          | .55                              | 2,048.00                        |
| C. S. Leede.....         | 1,023.72          | .28                              | 1,024.00                        |
| Wm. E. Leede.....        | 2,047.45          | .55                              | 2,048.00                        |
| Dorothy Leede .....      | 2,047.45          | .55                              | 2,048.00                        |
| Eleonore M. Leede.....   | 2,047.45          | .55                              | 2,048.00                        |
| E. A. Hulitz.....        | 1,433.21          | .79                              | 1,434.00                        |
|                          | <hr/> \$61,423.39 | <hr/> \$7.61                     | <hr/> \$61,431.00”              |

The Following Resolution was thereupon unanimously adopted:—

“Resolved that Seattle-First National Bank is hereby selected as the bank of and the depository for the funds of this corporation, which may be withdrawn on checks, drafts or advises of debit

(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)

given or signed in the corporate name by any two of the following:—

|                          |                |
|--------------------------|----------------|
| W. Braicks.....          | President      |
| Fred W. Wonn.....        | Vice-President |
| J. G. Molz .....         | Secretary      |
| Eleonore Pfisterer ..... | Treasurer      |

each of whom is also authorized to draw and accept drafts and execute contracts and other agreements between the bank and the corporation, and to make, collect, discount, negotiate, indorse and assign, in the corporate name, all checks, drafts, notes and other paper payable to or by this corporation; and all such paper, signed as aforesaid, including checks payable to the order of any one or more of said persons or to bearer shall be honored by the bank and charged to our account. Indorsements for deposit may be made by rubber stamp and shall bind the corporation to the same effect as though signed by the properly authorized officers. This authority shall continue in force until notice in writing shall have been given to and received by the bank. All transactions aforesaid which have taken place heretofore are hereby confirmed and ratified.”

The following Resolution was thereupon unanimously adopted:—

“Resolved that The National Bank of Commerce of Seattle be and it hereby is selected as a depository for the funds of this Corporation, and that said funds shall be withdrawn from said depository

(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)

on the check of this Corporation, signed by any two of the following:—

|                          |                |
|--------------------------|----------------|
| W. Braicks .....         | President      |
| Fred W. Wonn.....        | Vice-President |
| J. G. Molz .....         | Secretary      |
| Eleonore Pfisterer ..... | Treasurer      |

and that the authority hereby conferred shall continue in force until notice of its revocation in writing shall be given to the depository.

Be it further resolved that the said officers, or either of them, are authorized by and on behalf of the Company to borrow at said The National Bank of Commerce of Seattle, on promissory notes or other evidences of indebtedness of this Company, and to discount, endorse and negotiate acceptances, promissory notes and other negotiable paper with said Bank, and to withdraw the proceeds thereof.

Be it further resolved, that the authority hereby conferred shall include the authority to draw and/or endorse checks and other paper payable (or by said officers or either of them made payable) to the order of, or for the benefit of said officers, or either of them, or to cash, or to bearer, and to receive, jointly or severally, the payments or proceeds thereof.”

(Testimony of J. G. Molz.)

Plaintiff's Exhibit No. 6—(Continued)

There being no further business the meeting was adjourned.

W. BRAICKS,  
President.  
J. G. MOLZ,  
Secretary.

---

Q. I notice that that liquidating resolution was dated September 30, 1937, and that the Minutes of the new [68] company show a first meeting of stockholders on September 25, 1937?

A. Yes.

Q. Do you know the occasion for the organization steps being taken in the new company prior to the dissolution of the old?

A. All of our business is governed by the Internal Revenue Department in consultation, at the place; as soon as we were sure of the wishes of our stockholders and we contacted the officer in charge of the Alcohol Tax Unit in Seattle, who told us at no time——

Mr. Winter (Interrupting): I object to what someone told him as not binding on the United States.

Mr. Jones: I think it is true, not binding, but I am asking him to explain the difference in dates of the two companies, I think without trying to bind anybody, what this other man said—that is not the

(Testimony of J. G. Molz.)

purpose at all, merely to afford an explanation why they——

The Court (Interrupting): With reference to their right to make wine with the alcohol tax?

Mr. Jones: It doesn't involve the tax question at all.

The Court: I will overrule the objection.

Mr. Winter: I couldn't anticipate what the witness is going to say.

A. Our premises, are bonded premises and in order to continue or protect our type or any type of operation, it was necessary to disclose to the Alcohol Tax Unit steps which might be taken in order to protect the license and in order to protect the property of the United States, [69] as far as tax collection is concerned; that is why it was necessary to apply for a license for the new company, even previous to liquidating the old.

Q. Do you recall what action, if any, was taken with reference to advising shareholders as to amounts to be reported by them upon the liquidation of the old company?

Mr. Winter: We object to that as irrelevant and immaterial, if the Court please, what they advised the stockholders to do, after the organization.

Mr. Jones: I think it is quite important to show one of the theories we go on is the stockholders were advised to report and did report the income from this transaction accruing to them as taxable income.

(Testimony of J. G. Molz.)

The Court: You already proved that this morning with the two letters of Mr. Buschmann.

Mr. Jones: I proved as to Mr. Buschmann, not all the stockholders.

The Court: I will overrule the objection.

Q. You can state, briefly, what you did about that, what you individually and as Secretary of the Company?

A. Similar letters were sent to all the stockholders, notifying them of the complete assets of the liquidated company and showing them their proportionate share of these liquid assets.

Q. Did you file an income tax return, yourself, for 1937?      A. I did.

Q. And did you return the amount of your income from this liquidation in your income tax return?      A. I did.

Mr. Jones: Do you have his income tax return, [70] Mr. Winter, or a copy of it? If you find it later, we can submit it. We have his testimony here.

Mr. Winter: I don't see it.

Q. Was there a sheet like that, attached to the deposition, wasn't there, Your Honor, in connection with Mr. Buschmann's testimony? (Indicating)

The Court: No.

Mr. Jones: He referred to a statement or analysis——

The Court: No, this is what was attached? (Indicating)

(Testimony of J. G. Molz.)

Mr. Jones: Yes.

Q. I will show you what is marked "Analysis of individual profits on dissolution distribution" and ask you if you can identify that paper?

A. Yes, I can.

Q. What is it?

A. It is an analysis of individual profits on dissolution distribution, dated October 4, 1937.

Q. Who prepared it?

A. It was prepared by Harold Scott.

Q. And was anything done with that with reference to the individual stockholders?

A. Each stockholder was notified of his proportionate share in the company.

Q. As shown on that statement?

A. That is correct.

Mr. Jones: I will ask to have this marked as plaintiffs' exhibit 7. Then I will have Mr. Scott identify it further as to what was done. (Handing [71] document to Mr. Winter.)

You have seen it, Mr. Winter.

That is all, Mr. Molz.

### Cross Examination

By Mr. Winter:

Q. How long did you say you have been with the Pommerelle Company, Inc. or its predecessor?

A. Since 1934, September 15th, if I remember correctly.

Q. You have increased the capitalization of the



(Testimony of J. G. Molz.)

old company without reorganization prior, didn't you?      A. That is entirely possible.

Q. Well, isn't it a fact, don't you recall, the capital was increased of your company while you were Secretary without liquidation?

A. That is right.

Q. Then the purpose of your liquidation was to get higher valuation capital stock, wasn't it?

A. Partly.

Q. Wasn't that, solely, the reason?

A. We wanted that—we wanted to increase our capital value——

Q. (Interrupting) You could have increased your capital value without capitalization or reorganization?      A. Yes.

Q. And you so understood?

A. We discussed this matter very carefully before.

Q. A long time before that?      A. Yes.

Q. It was understood between you and the officers, you would handle it in this manner to get a higher capitalization? [72]

A. Yes.

Q. And, as a matter of fact, you organized the new corporation in September 25th, 1937? and held your first meeting?      A. That is right.

Q. And it was intended that the corporation would carry right on the wine that was in the process of manufacture at that time?

A. I explained to you a few minutes ago, we had the Alcohol Tax Unit——

(Testimony of J. G. Molz.)

Q. (Interrupting) You had wine in the process of manufacture? A. Yes.

Q. And there wasn't—you went right on with your deliveries and sales on the day of the——?

A. (Interrupting) That is right.

Q. Now, you say, when you carried out—I think you stated that you carried out, pursuant to the resolution, you carried out the provisions of the resolution of September 30th, 1937—what did you mean by that statement, that you carried it out?

A. We were fully aware, individually, that we had to face quite a stiff income tax problem, ourselves, as stockholders and we were fully prepared to meet that obligation and pay it. Our stockholders knew, in the event the company was to be liquidated, they, themselves, had to dig into their pockets and pay it.

Q. When you say “carried out the provision of that”, you were thinking of your own income liability? A. Definitely.

Q. What did you do with respect to the title to real estate, or contracts for real estate? [73]

A. As far as we knew, that was all transferred at the time, it had to be done.

Q. It wasn't transferred until 1939?

A. All transferred, as far as I knew; unfortunately, possibly one of our lawyers made a mistake, I don't remember.

Q. Did you execute or make any assignment of a real estate contract at that time?

(Testimony of J. G. Molz.)

A. I, personally, am not an attorney.

Q. I am asking if you did, as liquidating trustee?

A. Yes, I tried to do everything I possibly could.

Q. Don't you know, as a matter of fact, it wasn't until 1939 you made an assignment of the contract to purchase real estate? A. I don't know.

Q. That the company owned?

A. I haven't any idea of that particular transaction.

Q. Don't your records show, can't you tell the Court what instruments you executed at that time?

A. The statement to the company was made October 4th.

Q. You didn't execute a bill of sale to the new company? A. Everything——

Q. (Interrupting) Did you?

A. Everything was included——

Q. (Interrupting) I say, you didn't, did you?

A. Bill of sale?

Q. Yes? A. No.

Q. Nor did you give any deeds to property?

A. We didn't have property. [74]

Q. You didn't contract to purchase property?

A. Yes.

Q. You didn't make any assignment at that time?

A. No, sir.

Q. And all you say you did was to think about your income tax liability, that was carrying out the provision—you understood it was agreed the company would continue to run, continue to operate

(Testimony of J. G. Molz.)

with the wine in process just the same as before, wasn't it?

A. Naturally, we had to keep this company going because it was our bread and butter.

Q. How much did you offer to pay for the stock, to the individuals?

A. Well, it was agreed, divided according to our absolute assets, this list of assets, as was computed by our accountant and the list was divided into the stock outstanding at the time that happened.

Q. All liability transferred to the new corporation?

A. Were to be paid out of those assets, out of the old corporation before liquidation — so much left.

Q. It was intended to transfer those liabilities to the new corporation?

A. I wouldn't say, transfer the assets, what was left over.

Q. Did they take over the assets?

A. As far as I am concerned; I really don't remember the technical aspects but the company was absolutely dissolved at the time, there wasn't anything left.

Q. I didn't ask you what the effect was, I am asking what you transferred. Didn't you transfer the assets to the new corporation?

A. No, we sold everything we had at the time.

[75]

Q. Who did you sell it to?

A. Well, it was offered for sale.

(Testimony of J. G. Molz.)

Q. Who did you offer it for sale?

A. Naturally, to the people who happened to be at this meeting and if they were agreeable to buying, fine, if not someone else would have bought.

Q. I thought you said you offered to purchase their stock?

A. No, if they had wanted to sell, I would have been most happy to——

Q. (Interrupting) Buy their stock?

A. Definitely.

Q. Who first proposed this liquidation reorganization, your accountant, Mr. Scott?

A. We sat together several times; we had our regular monthly meetings and in these meetings discussed various problems facing us and, as I mentioned before, we were growing so rapidly and our Company was in such a difficult position that it was necessary for us to do something and this was the plan we adopted.

Q. Well, you had, also, had a growth previous, your company had had a very marked growth previous to that time?      A. That is correct.

Q. And you had increased the capitalization one or two times before?      A. Yes.

Q. What was the capitalization at the time of the so-called liquidation?

A. If I remember right, it must have been 20,000 or 25,000 shares.

Q. Originally, 1,000 shares? [76]

(Testimony of J. G. Molz.)

A. Yes.

Q. Increased up to 20,000? A. Yes.

Q. You made no attempt to liquidate that company, you had changed the name? A. Yes.

Q. Increased the capitalization?

A. Well, in those days, of course, we had an awful tough time; we first started out losing money right along; gradually, as we got under way, we made a little bit of money but it was all put absolutely back in the business; there was just nothing left, we felt this was a legitimate way to take care of our problem.

Q. Well, the stockholders both before and after the so-called liquidation were the same, were they not? A. Yes, they happened to be the same.

Q. I say, they were the same? A. Yes.

Q. The proportion, or ratio, capital stock held by the stockholders in the old corporation was identical with that held in the new? A. Yes.

Q. The balance of the old stock of the company was the same as that of the new company and the net worth, \$60,000, was the same in both instances, was it not? A. That is right.

Q. The type and class of the stock was the same in the old and new companies, the assets and liabilities assumed by the new company were those of the old company, were they not? [77] A. Yes.

Q. No new capital was put in the corporation as the result of the reorganization, was there?

A. No.

Q. No transfer of real estate was ever made to

(Testimony of J. G. Molz.)

the shareholders and title to the personal property, was ever transferred to the shareholders, was it?

A. You mean, trucks——?

Q. Did you execute any bills of sale to personal or real property, to the shareholders?

A. Not that I know of.

Mr. Winter: I think that is all.

Redirect Examination

By Mr. Jones:

Q. Did the Company own any real estate to which it had title at that time?

A. No, only had this contract, if I remember, at that time we were purchasing a hotel on Dearborn Street.

Q. And what was done about the contract?

A. I really could not tell you, I feel reasonably certain everything was attended to, I couldn't tell you, I haven't the slightest idea; I didn't take care of the real estate proposition.

Q. Now, I asked you if you filed a personal income tax return in which you included your determined share of the property as income? Have you ever filed any claim for refund of tax on account of that transaction?

Mr. Winter: I object to that as incompetent, [78] irrelevant and immaterial, in this case.

Mr. Jones: That is probably true, yet it might be of some significance to show that the Commissioner has never refunded to the shareholders, he is



(Testimony of J. G. Molz.)

still retaining the tax they paid on the theory this was a taxable transaction.

Mr. Winter: I don't think that, necessarily, follows. It seems to me there is nothing in the law which would require the Commissioner, certainly, taking the position it was non taxable dividends.

The Court: I won't admit it on that basis, Mr. Jones, I admitted part of the testimony, the testimony with reference to Mr. Buschmann this morning, on this theory, I don't know whether it is coming into this case at all, the question of good faith or bad faith in the transaction; now you say, very frankly, in your statement one of the purposes of this was to solve their tax problem. Now, some people attempt to solve their tax problems by doing it—by means of subterfuges, things of that kind, I don't know whether that is an element in this case, but I will admit the testimony on that possible theory, that it might tend to negative that, if that inference is drawn from the fact the transaction was put through.

Q. I think you did testify that you did include that, you say you never filed a claim for refund of tax to yourself?

A. Well, I filed—I didn't file it, I signed a statement at the time.

Q. Have you received any refund of that tax?

A. No, I have not. [79]

Mr. Jones: That is all.

(Witness excused)

HAROLD L. SCOTT,

called as a witness on behalf of the plaintiffs herein,  
being first duly sworn, testified as follows:

Direct Examination

By Mr. Jones:

Q. State your name? A. Harold L. Scott.

Q. Your business?

A. Certified Public Accountant.

Q. Where do you carry on that business?

A. In Seattle.

Q. How long have you been practicing that profession?  
A. About 23 years.

Q. What has been your connection with the Pommerelle Company, the old and new companies?

A. We were employed as accountants for the old company and new company.

Q. Do you recall the occasions that have been testified to, about liquidating the old corporation and organizing the new corporation?

A. Yes, I do.

Q. What, if anything, did you have to do with that?

A. I was called by the company's officials in the summer of 1937 relative to their problems, they wanted to know what could be done to work them out and we made the examination to determine what should be done and what [80] would be the best thing to do, and made recommendations accordingly.

Q. Now, there is involved in this case an item of \$75.00 paid to a Mr. Bordson during the year

(Testimony of Harold L. Scott.)

1937, which has been disallowed by the Commissioner, do you know what that item represented?

A. As I recall it, that represented—

Mr. Winter: (Interrupting) If it is taken from the books and records (if he knows of his own knowledge, we have no objection) but if it is taken from the books and records, the books and records are the best evidence.

Mr. Jones: Your 90-day letter states, fee for increasing capital stock, 1937.

Mr. Winter: In your protest, the basis of this suit, I quote—

Mr. Jones: (Interrupting) Let it go. The 90-day letter will speak for itself anyhow, showing what the nature of it was.

Q. Now, did you have an item of either \$600.00 or \$685.00 to your Company, Mr. Scott?

A. Yes, \$600.00.

Q. What was that for?

A. \$450.00 approximately—it wasn't segregated—the account was rendered as one item—\$450.00 approximately would be the cost of preparing the income tax returns and preparing the statements of the company.

Q. During what period?

A. During the period January 1st to October 4th, 1937, and \$150.00 in connection with the dissolution of the company. [81]

Q. And was that amount, \$600.00, paid to you by the company? A. Yes.

(Testimony of Harold L. Scott.)

Q. Now, with reference to the matter of dissolution of the old company, you said that you were consulted with reference to certain problems of the company, what were the problems you had in mind?

A. Well, the company had a low declared value for capital tax purposes, at the time the declaration was made the company was small and it had had a very sudden growth; the earnings——

The Court: (Interrupting) Non par stock?

Mr. Jones: No, \$1.00 stock.

The Court: To get it in the record.

A. \$1.00 par value. Their earnings had been increasing year by year and they had declared their capital stock value at, I believe, to be \$100,000.00 and that, therefore, gave them an exemption \$10,000.00 excess profit taxes; their earnings for 1937 were increasing and were far in excess of that and they asked my suggestions as to what I felt should be done and I made an investigation to see what recommendation should be made and came to the conclusion that the best way to handle the matter would be to liquidate the corporation and if they, all of the stockholders, wanted to go on with the new corporation, they could or any part of them wanted to withdraw, but insisted they be given that right,—there must be a complete liquidation of the old company and if they wanted to subscribe and put in their assets, their undivided portion of those assets into the new corporation, [82]

(Testimony of Harold L. Scott.)

that they must have that right or they could sell them or take them or do anything they saw fit with them.

Q. Do you know whether there was any discussion of these matters you have just testified to between you and the other stockholders, among the stockholders, themselves?

A. Yes, there was.

Q. Tell us what you know about that, to what extent it was discussed among the stockholders?

A. I believe I was at two meetings of the company; I remember one very definitely, where just before the liquidation was entered into, I went into it very much in detail. There was the one question as to whether or not this liquidation should be made to be a taxable transaction or non taxable transaction. I wrote Prentice Hall and Commerce Clearing House relative to it and I believe in the Commerce Clearing House rewrite service, there was quite a discussion of the matter and they held that——

Mr. Winter: (Interrupting) We object to what the Commerce Clearing House says.

Q. You can't state that.

A. I discussed with the group of the stockholders as to whether it should be tried to be made a non taxable reorganization or a taxable reorganization and I recommended that they should follow a taxable reorganization, due to the fact that there was a question in my mind as to whether it could

(Testimony of Harold L. Scott.)

be held to be non taxable. In other words, that they could actually prove a non taxable reorganization, and have the right to get their increased declared value on the new corporation. [83]

Q. What—? go ahead. I thought you were through.

A. And then I carefully explained to each one of the stockholders that were present at this meeting, and I believe the larger stockholders were all there, that they would have to pay the tax on their proportionate share, as a liquidation over and above their original cost and I am sure that there was no question as to what that was clearly understood by those present and I prepared a statement later and gave it to the company's officials, which was forwarded later to the stockholders, showing their proportionate amount.

Q. Is this plaintiffs' 7 (8) for identification, the statement to which you refer?

A. Yes, it is; yes, this is the statement we prepared in our office, one of the carbon copies.

Mr. Jones: I offer it in evidence.

#### Cross Examination

By Mr. Winter:

Q. I take it, this is an analysis of the books of the Pommerelle Company, Inc., your analysis of the books of the Pommerelle Company, Inc., is that right?

A. No, I don't take the analysis of the company's books at all. I take it as of the date of the



(Testimony of Harold L. Scott.)

purchase of shares by each stockholder, as shown by the——

Q. (Interrupting) Books?

A. Stock records of the company and showing the number of shares purchased, the date purchased, the cost at par.

Q. As shown by their books? [84]

A. I wouldn't say yes, I don't think there have been any transfers of this stock, except stock that was purchased from the company. I can't answer that question, Mr. Winter, for this reason——

Q. (Interrupting) You made the exhibit, didn't you?

A. It shows the cost at par and I am sure that that is the cost to each one of these stockholders.

Q. Well, it is an analysis of the information taken from the books of the Pommerelle Company, Inc., isn't it?

A. When you say "books", that is the part I am questioning.

Q. "Records" of the Company, then?

A. Yes, from the records—I guess I can answer it yes.

Q. Books and records?

A. Yes, then distribution, October 4, 1937, amount distributable to each man on each purchase of his stock. In other words, dividing it between the dates of purchase because he had different rates of pay the tax at and the time held and percent of profit to report and net profit he should include in his taxes.



(Testimony of Harold L. Scott.)

Q. Values thereon are book values, as shown by the books of the company, is that right?

A. Yes.

Q. You made no attempt to valuation on the assets, anything of that nature, except what the books showed, is that right?

A. Well, the books would show the value of the inventory at the date of the dissolution.

Q. I say, it was book values as shown in the books of the company? A. That is right.

[85]

Q. You made no independent investigation or no attempt to set any values, other than shown in the books? A. I think——

Q. (Interrupting) Personally, I mean?

A. That was analyzed——

Q. (Interrupting) I said “You”, Mr. Scott. You understood my question.

A. I understand your questions. In any liquidation, a person——

Q. (Interrupting) That is not responsive. Did you make a personal investigation as to the value of assets? A. I am not a valuation engineer.

Q. I didn't ask you if you were a valuation engineer, Mr. Scott, did you make any investigation? A. Yes, there was some investigation.

Q. You did, personally? A. Yes.

Q. You attempted to value some assets?

A. Certificates were carefully analyzed to see what were good and bad, surely.

(Testimony of Harold L. Scott.)

Q. Any physical assets other than intangibles?

A. The question was to determine the cost of the wine—I made a very careful examination to determine that.

Q. Other than was shown on the books of the company?

A. We gave them the figures to put on the books.

Q. At that time?                      A. Yes.

Q. Then you arrive at your——?

A. (Interrupting) Closing entries were given to the company by ourselves. [86]

Q. You arrive here, the last figure, what you consider the net profit to report?

A. That is correct.

Q. And that is your conclusion as an accountant for the company?                      A. That is right.

Mr. Winter: We have no objection for what it is worth, if the Court please, an analysis of an accountant.

The Court: It may be admitted.                      ?

The Clerk: Plaintiffs' exhibit No. 7.

Plaintiffs' Exhibit No. 7, the statement last above referred to, admitted in evidence.

## PLAINTIFF'S EXHIBIT No. 7

POMMERELLE COMPANY, INC.

## ANALYSIS OF INDIVIDUAL PROFITS ON DISSOLUTION DISTRIBUTION

October 4, 1937

Page 1

|                         | No. of Shares |        | Date Purchased | Cost at Por | Distribution October 4, 1937 |             | Profit    | Total       | Time Held    | Per Cent of Profit to Report | Net Profit to Report |             |
|-------------------------|---------------|--------|----------------|-------------|------------------------------|-------------|-----------|-------------|--------------|------------------------------|----------------------|-------------|
|                         | Purchases     | Total  |                |             | 2,408,760.3                  | Total       |           |             |              |                              |                      |             |
| A. Vanderspeck .....    | 225           |        | 2- 3-34        | \$ 225.00   | \$ 541.97                    |             | \$ 316.97 |             | 2 to 5 Years | 60                           | \$ 190.18            |             |
|                         | 1,775         |        | 9- 1-34        | 1,775.00    | 4,275.55                     |             | 2,500.55  |             | 2 to 5 Years | 60                           | 1,500.33             |             |
|                         | 1,000         |        | 6-10-35        | 1,000.00    | 2,408.76                     |             | 1,408.76  |             | 2 to 5 Years | 60                           | 845.26               |             |
|                         | 2,100         | 5,100  | 12-14-36       | 2,100.00    | 5,058.40                     | 12,284.68   | 2,958.40  | 7,184.68    | Under 1 Year | 100                          | 2,958.40             | \$ 5,494.17 |
| W. Braicks .....        | 225           |        | 2- 3-34        | 225.00      | 541.97                       |             | 316.97    |             | 2 to 5 Years | 60                           | 190.18               |             |
|                         | 1,275         |        | 9- 1-34        | 1,275.00    | 3,071.17                     |             | 1,796.17  |             | 2 to 5 Years | 60                           | 1,077.70             |             |
|                         | 1,000         |        | 6-10-35        | 1,000.00    | 2,408.76                     |             | 1,408.76  |             | 2 to 5 Years | 60                           | 845.26               |             |
|                         | 1,750         | 4,250  | 12-14-36       | 1,750.00    | 4,215.33                     | 10,237.23   | 2,465.33  | 5,987.23    | Under 1 Year | 100                          | 2,465.33             | 4,578.47    |
| J. G. Molz.....         | 200           |        | 2- 3-34        | 200.00      | 481.76                       |             | 281.76    |             | 2 to 5 Years | 60                           | 169.06               |             |
|                         | 1,950         |        | 11-27-36       | 1,950.00    | 4,697.08                     |             | 2,747.08  |             | Under 1 Year | 100                          | 2,747.08             |             |
|                         | 1,505         | 3,655  | 12-14-36       | 1,505.00    | 3,625.18                     | 8,804.02    | 2,120.18  | 5,149.02    | Under 1 year | 100                          | 2,120.18             | 5,036.32    |
| Eleonore Pfisterer..... | 1,500         |        | 10-17-35       | 1,500.00    | 3,613.14                     |             | 2,113.14  |             | 1 to 2 years | 80                           | 1,690.51             |             |
|                         | 250           |        | 11-27-36       | 250.00      | 602.19                       |             | 352.19    |             | Under 1 Year | 100                          | 352.19               |             |
|                         | 1,225         | 2,975  | 12-14-36       | 1,225.00    | 2,950.72                     | 7,166.05    | 1,725.72  | 4,191.05    | Under 1 Year | 100                          | 1,725.72             | 3,768.42    |
| August Buschmann.....   | 1,000         |        | 10-21-35       | 1,000.00    | 2,408.76                     |             | 1,408.76  |             | 1 to 2 years | 80                           | 1,127.01             |             |
|                         | 500           |        | 6-10-35        | 500.00      | 1,204.38                     |             | 704.38    |             | 2 to 5 Years | 60                           | 422.63               |             |
|                         | 1,050         | 2,550  | 12-14-36       | 1,050.00    | 2,529.20                     | 6,142.34    | 1,479.20  | 3,592.34    | Under 1 Year | 100                          | 1,479.20             | 3,028.84    |
| Fred W. Wonn.....       | 225           |        | 2- 3-34        | 225.00      | 541.97                       |             | 316.97    |             | 2 to 5 Years | 60                           | 190.18               |             |
|                         | 775           |        | 9- 1-34        | 775.00      | 1,866.79                     |             | 1,091.79  |             | 2 to 5 Years | 60                           | 655.07               |             |
|                         | 700           | 1,700  | 12-14-36       | 700.00      | 1,686.13                     | 4,094.89    | 986.13    | 2,394.89    | Under 1 Year | 100                          | 986.13               | 1,831.38    |
| Gilbert Kroll .....     | 500           |        | 11-27-36       | 500.00      | 1,204.38                     |             | 704.38    |             | Under 1 Year | 100                          | 704.38               |             |
|                         | 350           | 850    | 12-14-36       | 350.00      | 843.07                       | 2,047.45    | 493.07    | 1,197.45    | Under 1 Year | 100                          | 493.07               | 1,197.45    |
| J. Kangley .....        | 500           |        | 11-27-36       | 500.00      | 1,204.38                     |             | 704.38    |             | Under 1 Year | 100                          | 704.38               |             |
|                         | 350           | 850    | 12-14-36       | 350.00      | 843.07                       | 2,047.45    | 493.07    | 1,197.45    | Under 1 Year | 100                          | 493.07               | 1,197.45    |
| C. S. Leede.....        | 250           |        | 11-27-36       | 250.00      | 602.19                       |             | 352.19    |             | Under 1 Year | 100                          | 352.19               |             |
|                         | 175           | 425    | 12-14-36       | 175.00      | 421.53                       | 1,023.72    | 246.53    | 598.72      | Under 1 Year | 100                          | 246.53               | 598.72      |
| Wm. E. Leede.....       | 500           |        | 6-10-35        | 500.00      | 1,204.38                     |             | 704.38    |             | 2 to 5 Years | 60                           | 422.63               |             |
|                         | 350           | 850    | 12-14-36       | 350.00      | 843.07                       | 2,047.45    | 493.07    | 1,197.45    | Under 1 Year | 100                          | 493.07               | 915.70      |
| Dorothy Leede .....     | 500           |        | 6-10-35        | 500.00      | 1,204.38                     |             | 704.38    |             | 2 to 5 Years | 60                           | 422.63               |             |
|                         | 350           | 850    | 12-14-36       | 350.00      | 843.07                       | 2,047.45    | 493.07    | 1,197.45    | Under 1 Year | 100                          | 493.07               | 915.70      |
| Eleonore M. Leede..     | 500           |        | 6-10-35        | 500.00      | 1,204.38                     |             | 704.38    |             | 2 to 5 Years | 60                           | 422.63               |             |
|                         | 350           | 850    | 12-14-36       | 350.00      | 843.07                       | 2,047.45    | 493.07    | 1,197.45    | Under 1 Year | 100                          | 493.07               | 915.70      |
| E. A. Hulitz.....       | 350           |        | 6-10-35        | 350.00      | 843.07                       |             | 493.07    |             | 2 to 5 Years | 60                           | 295.84               |             |
|                         | 245           | 595    | 12-14-36       | 245.00      | 590.14                       | 1,433.21    | 345.14    | 838.21      | Under 1 Year | 100                          | 345.14               | 640.98      |
|                         |               | 25,500 |                | \$25,500.00 |                              | \$61,423.39 |           | \$35,923.39 |              |                              |                      | \$30,119.30 |

Page 2



(Testimony of Harold L. Scott.)

Direct Examination

(Continued)

By Mr. Jones:

Q. Mr. Scott, you said in previous answers to my questions that there was discussion between you and the stockholders and amongst the stockholders, themselves, about stockholders of the old company coming into the new [87] company or not. I would like to have you tell us a little bit more what that discussion was and what individual stockholders you recall having participated in it?

A. Well, I was asked the question as to whether or not all stockholders had to come in——

Mr. Winter: (Interrupting) We insist on the time, place and dates, if he is going to tell a conversation with certain individuals.

The Court: I will sustain the objection.

He asked you the question which stockholders you talked to. You can answer that question?

A. Yes, Mr. Braicks, Mr. Molz, Dr. Leede, Mr. Vanderspek, Mr. Buschmann, Mr. Wonn, Mrs. Pfisterer I believe was there.

Q. About when did these conversations occur?

A. Oh, somewhere in September 1937.

Q. And what was the substance of them?

A. As to whether or not all of the stockholders were compelled to come in and subscribe to the stock of the new corporation or if they wanted to

(Testimony of Harold L. Scott.)

withdraw and take their share of the assets, and I said if they dissolved the old corporation, they would be entitled to take their share and do as they saw fit with them and—that is the answer to it.

Q. Was there any discussion as to what would be done in case any stockholder didn't want to go in the new corporation? A. Yes, there was.

Q. What was that? [88]

Mr. Braicks and Mr. Vanderspek, Mr. Molz, Mr. Buschmann said that they—if any stockholder didn't want to go ahead and turn his share of the assets that they received from the liquidation into the new corporation, that they would get together and buy up that share.

Q. Are you, personally, familiar with whether any arrangements were made with any bank for accomplishing that?

A. Yes, I was familiar with it; it is pretty hard, maybe, for me to testify to it.

Q. All right. I won't ask you further.

A. I know what took place but I don't believe I can testify to it.

Q. Did you represent Mr. Vanderspek, one of the stockholders of this Company? A. Yes.

Q. In connection with these tax matters?

A. Yes, I did.

Q. Mr. Vanderspek, I believe, is ill and couldn't come over here to testify?

A. Yes, he has been sick for sometime.

(Testimony of Harold L. Scott.)

Q. You hold his power of attorney, as of 1937?

A. Power of attorney filed in the Agent's office in my favor.

Mr. Jones: Do you have Mr. Vanderspek's return, Mr. Winter? You had the copy when you took his deposition?

Mr. Winter: Yes.

I don't know if I am privileged to disclose Mr. Vanderspek's income tax return, if the Court please. Mr. Vanderspek is not here and certainly has [89] not filed a power of attorney of Mr. Scott with me to the effect—I have never seen it.

Mr. Jones: Mr. Winter, when we took the depositions, it is my recollection you said you had Mr. Vanderspek's return.

Mr. Winter: I have Mr. Vanderspek's return.

Mr. Jones: (Continuing) And Mr. Scott had the power of attorney and on his say-so, may be inspected.

Mr. Winter: Now that you call my attention, I think I have Mr. Vanderspek's—I don't want to divulge any information here——

Mr. Jones: (Interrupting) That is my understanding; if not, we can get his report.

Mr. Winter: I didn't have his power of attorney.

Mr. Jones: I think you have.

Mr. Winter: No, Mr. Braicks' and Mr. Molz' is the only thing I had——

Mr. Jones: (Interrupting) May I ask this, Mr.



(Testimony of Harold L. Scott.)

Winter, if I get written authorization from Mr. Vanderspek to produce his return and file his return, will you produce it?

Mr. Winter: If the Court orders me to produce it, I will do it.

Mr. Jones: I don't want to embarrass you, if you want to produce it.

Mr. Winter: I don't have that information. May I ask Mr. Scott one question?

Mr. Jones: Yes. [90]

Mr. Winter: Did you file claim for refund on Mr. Vanderspek's income tax? A. No.

Mr. Winter: You did on——?

A. (Interrupting) Mr. Molz and Mr. Braicks.

Mr. Winter: That is the power of attorney I have, Mr. Jones; only reports, Revenue Agent's, is Braicks and Molz, we have the power of attorney on those cases.

Mr. Jones: I thought he had power of attorney for Mr. Vanderspek?

A. That is true, I have power of attorney for Mr. Vanderspek.

Mr. Jones: Is it on file with the Revenue Department?

A. In the Agent's office, Mr. Winter made that statement when my deposition was taken.

Mr. Winter: I remember in respect to one of them, Mr. Jones.

A. That is the one I think you are speaking of.

(Testimony of Harold L. Scott.)

Mr. Winter: Do you recall that was taken down?

Mr. Jones: I don't remember it being in the transcript; I do remember it in the discussion.

Mr. Winter: I didn't have his file, Mr. Jones.

Mr. Jones: If I get a letter of authority from Mr. Vanderspek to publish his return, you will produce it and permit it to be filed, will you?

Mr. Winter: I beg your pardon, Mr. Jones, I can produce it right here. Here is where we got it, Mr. Jones, attached to the return as a——

Mr. Jones: (Interrupting) I knew you had it.

[91]

Mr. Winter: That is where we got it.

Mr. Jones: I offer in evidence as plaintiffs' Exhibit No. 8 photostatic copy.

The Court: How do you spell it?

Mr. Jones: V-a-n-d-e-r-s-p-e-k.

The Court: 1937?

Mr. Jones: Yes, 1937 return.

The Court Admitted.

Mr. Winter: We have no objection to a copy being produced, but we do object to it as incompetent, irrelevant and immaterial, that it has nothing to do with the issues in this case.

The Court: I will admit it with the same reservation.

Mr. Jones: That is all.

Plaintiffs' exhibit No. 8, the 1937 income tax return of Mr. Vanderspek, admitted in evidence.

(Testimony of Harold L. Scott.)

Cross Examination

By Mr. Winter:

Q. Did you prepare claim for refund for the Pommerelle Company, Inc., in this case, Mr. Scott?

A. Let me see it there. I don't believe I did. I think Mr. Jones' office prepared it. No, we didn't prepare that. (Indicating document.)

The Court: Do I understand, claim for refund for Braicks and Molz—before the part of their return—being as a result of paying tax?

Mr. Winter: Yes, they filed claim for refund.

[92]

Q. You were attorney for Mr. Braicks and Mr. Molz?

A. Yes, I prepared their tax returns.

Q. You prepared their returns and also on their behalf filed claims for refund?

A. After this case, tax was paid on this case, or after the 90-day letter was issued, I filed claims, as protective claims.

Q. You did file claims for them? A. Yes.

Q. And, in the event this case is adverse to the plaintiff, of course you will proceed to——?

A. (Interrupting) I presume so, yes.

Q. (Continuing) ——work on those claims, won't you? A. Yes.

Q. Now, on the amounts, the profit which you have set forth in your analysis, that is the profit of the individual stockholder which you have set

(Testimony of Harold L. Scott.)

forth? You show, for example, a profit to J. J. Molz of \$5,036.32?      A. Yes.

Q. Is that income or is that a capital gain?

A. That is capital gain—liquidation.

Q. And reportable 50 percent stock held more than two years?

A. That wasn't true at that time the law changed, since then part held from two to five years, some under one year; so, \$4800.00 of the \$5,000.00 was reportable 100 percent.

Q. Anyway, lower than 100 percent of the profit, which you show on that exhibit?

A. Well, his actual profit as shown on the exhibit was \$5149.02 and amount reportable on his tax return was \$5,036.32, a difference of \$113.00.

[93]

Q. Who is that, Braicks?      A. No, Molz.

Q. Give those figures again?

A. (Indicating on exhibit.)

Q. Molz didn't acquire the stock, most of it, until 1936, did he?

A. That is true, the majority of it acquired in 1936, latter part of 1936, held it less than one year.

Q. Mr. Vanderspek, the amount of his profit was \$7,184.68 and his taxable profit on his capital gain was only \$5,404.17, is that right?

A. That is correct.

Q. In none of these instances was it taxable at 100 percent gain?

A. The record shows here the profit realized

(Testimony of Harold L. Scott.)

by each and the amount reportable under the law for each one on account of the time held. (Indicating.)

Q. In no case was it 100 percent?

A. Yes, in C. S. Leede, it was 100 percent and in Kangley it was 100 percent and in Gilbert Kroll it was 100 percent.

Q. There was also only 60 percent on Dorothy Leede with respect to 500 shares, is that right?

A. That is correct.

Q. Dorothy Leede and William, 60 percent with respect to 500 shares? A. That is true.

Q. And 60 percent with respect to Wayne and 27, two 27——?

A. (Interrupting) That is correct.

Q. And various amounts? A. Yes. [94]

Q. Braicks only 60 percent on 2,495 shares?

A. 2,500 shares.

Q. 2,500 shares? A. That is correct.

Q. The exhibit shows percentage?

A. Yes, that is due to the conditions of the capital gain section.

Q. Now, Mr. Scott, the proceedings that were taken here with respect to the dissolution or reorganization, whichever you want to determine it, was your suggestion, your advice?

A. I think so.

Q. Did you have anything to do with executing any documents in connection with the actual transfer of any properties?

(Testimony of Harold L. Scott.)

A. You mean, personally?

Q. Yes?

A. No, I did not execute any documents; Mr. Bordsen was the Company's attorney at that time, he was handling that.

Q. I think you said that \$450.00, approximately, of your——? what was the amount of your bill to the company?      A. \$600.00.

Q. You say approximately \$450.00 was for auditing the returns and making income tax returns?

A. Auditing the books, making income tax returns, preparing statements of the company.

Q. How much time did it take to prepare the income tax returns after you got the audit?

A. I can't state exactly, I was just figuring the bill as nearly as I could. [95]

Q. On non taxable reorganization, the fees would have been approximately the same, would they not?

A. Well, I don't see any difference as far as taxable or non taxable reorganization.

Q. You would make no difference?

A. No, I don't think it would make any difference.

Q. Do you know what the \$75.00 bill was for, you say "\$75.00".      A. To Mr. Bordsen?

Q. Yes, if you know?

A. No, I would rather let one of the others testify to that.

(Testimony of Harold L. Scott.)

Q. Now, in the claim for refund filed it states "a portion of the assessment was based on the disallowance, deduction of certain expenses, totalling \$785.00, these were in their entirety professional services needed in winding up and liquidation of the company", is that true?

A. Where is that statement?

Q. In the claim for refund.

A. I didn't make claim for refund; I think this is the first time I ever seen it.

Q. You say you rendered your bill, you didn't make any allocation as to what portion of it was auditing and what proportion was preparing the books—I mean the returns?

A. No, I did not. I don't believe that anyone could make a definite line of any account of that type.

Q. Did you render any other bills to the Pommerelle Company, Inc. or did they pay any other moneys for [96] fees during the year 1937?

A. No, I did not.

Q. When were you first consulted by the Pommerelle Company, Inc. relative to their tax problems?

A. Oh, I would say in the year 1934, 1935.

Q. And you still represent the new company?

A. Yes.

Mr. Winter: I don't think of anything further.

Mr. Jones: That is all, Mr. Scott.

(Witness excused)



The Court: We will take a short recess.

(Short recess)

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L. H. BRAICKS

called as a witness on behalf of the plaintiffs herein,  
being first duly sworn, testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your name, please?

A. L. H. Braicks.

Q. You live in Seattle, Mr. Braicks?

A. Yes.

Q. Were you connected with the old Pommer-  
elle Company? A. Yes.

Q. Are you connected with the present new  
Pommerelle Company? A. Yes.

Q. What was your connection with the old  
Company? [97] A. President.

Q. And stockholder?

A. Stockholder and President.

Q. Were you President of that Company from  
the time of its organization? A. Yes.

Q. And what is your connection with the pres-  
ent new company?

A. Still President of the Company.

Q. So that you have been President for both  
companies throughout their existence?

A. Yes.

Q. Now, you recall the transaction we have

(Testimony of L. H. Braicks.)

been testifying about here, considering with reference to the liquidation of the old company and formation of the new?      A. Yes.

Q. What was the occasion for taking that step?

A. Well, in the first place, we had in mind to increase our capitalization and, second place, we wanted to try to get a higher declared value on our stock.

Q. And who advised you with reference to the steps to be taken?

A. We discussed it with Mr. Scott; he advised us what to do.

Q. And what did he advise you to do?

A. Liquidate the Pommerelle, Inc. and start a new corporation.

Q. Do you recall the meetings that were held at or about the time of the liquidation, meetings of the stockholders of the old company?

A. Yes.

Q. What do you recall as to any discussion or statements [98] with reference to the situation of any stockholder of the old company, who wanted to get out or stay out of the new company?

A. Well, we told the stockholders what we intended to do and told them also they were at liberty to stay out of the new corporation.

Q. What was said to them, if anything, as to their disposition of their share of the assets on liquidation, if they did not want to come into the new company?

(Testimony of L. H. Braicks.)

A. Well, some of the other stockholders would have probably bought them——

Mr. Winter: (Interrupting) We object to what they “probably” would have——

The Court: (Interrupting) Sustained.

Q. Not what you probably would have done. In substance, what was said to the stockholders?

A. We intended——

Mr. Winter: (Interrupting) Not your “intent.”

Q. Not your “intent”, unless it was communicated to them. In substance, what was said to them?

A. As to the new corporation?

Q. What they could do if they didn't want to come in the new corporation, what could be done with their share of the assets?

A. They could sell their shares.

Q. Who, if anyone, was prepared to buy it?

A. I, myself, bought some in; Dr. Leede was willing to buy and some other stockholders.

Q. Was any arrangement made with the bank to handle such a purchase, if necessary? [99]

A. Yes, I went to the National Bank of Commerce and discussed it with Mr. Witherspoon and asked him if he could——

Mr. Winter: (Interrupting) I object to what he asked someone else, communicated to someone else not here.

The Court: Overruled. He is testifying as to a fact, the fact that he had a conversation, told somebody, not a question of whether that conver-

(Testimony of L. H. Braicks.)

sation was true or false—I will overrule the objection, it is not a question of cross-examining Mr. Witherspoon.

Q. What did you take up with Mr. Witherspoon?

A. I told Mr. Witherspoon what we intended to do, liquidate the old corporation, form a new corporation; possibly some of the stockholders wouldn't want to go along, wanted to dispose of their share of the assets of the old corporation and asked him, if that should happen, if more than we could handle, whether we can come to the bank and borrow money and do it; he said yes.

Q. Do you recall whether you were advised as to the amount of profit on liquidation that accrued to you, individually?      A. Yes.

Q. And do you know whether or not you included that in your income tax return?

A. I beg your pardon?

Q. Did you include that in your personal income tax return?

A. Yes, I did; Mr. Scott made my return.

Mr. Jones: Do you have Mr. Braicks' return, Mr. Winter?

Mr. Winter: I don't have Mr. Braicks' return.

[100]

Q. Mr. Braicks, are you willing, if your return is located,——?

Mr. Winter: (Interrupting) I don't have it.

Q. (Continuing)——to have it received——?

(Testimony of L. H. Braicks.)

Mr. Winter: (Interrupting) I might say this, his original return would be with the claim for refund, which Mr. Braicks filed. That is the reason why I couldn't get it—his original return.

Q. If your original return is located before the case is closed, are you willing to have it received in evidence in this case and made public?

A. Yes.

Q. Now, you recall that the liquidation resolution was adopted on the 30th of September 1937 and that the formation of the new company or the filing of the articles occurred some days before that, I think about September 25th, as shown by the Minute Book? A. Yes.

Q. What was the reason, do you know, for that overlap and the starting out of the new company or incorporation of it before the dissolution of the old?

A. Well, we couldn't liquidate the old corporation and go out of business before we had a new corporation, because the licenses under which we were operating were not transferable, so we had to apply for new licenses, which the Federal—for that reason, we need both companies before we could liquidate the old one.

Mr. Jones: That is all. [101]

#### Cross Examination

By Mr. Winter:

Q. Of course, you understood and it was al-

(Testimony of L. H. Braicks.)

ways your intent to transfer the assets of the old corporation to the new corporation, isn't that right?

A. Yes.

Q. You never intended to put them on the market and sell them to anyone else?

A. No, we distributed them to the stockholders.

Q. You didn't intend to sell the assets? You didn't offer them for sale, you didn't want to sell them?

A. We didn't know.

Q. You didn't distribute the assets as such to the individuals other than to purchase their interest?

A. Yes, we would have purchased.

Q. Purchased their stock?

A. Yes.

Q. Would you have purchased their stock the day before?

A. No, we didn't intend to buy their stock; we intended to buy their share of the assets.

Q. According to the figures Mr. Scott made up for you?

A. Yes.

Q. You didn't intend to transfer the title to the property to the individuals, did you?

A. Well, if it had been necessary, yes.

Q. I say, you didn't intend to, at that time you didn't?

A. No, sir.

Q. You didn't make any assignment of the contract to the new company?

A. You mean, the real estate contract?

Q. Yes? [102]

A. No, it was forgotten.

Q. You forgot that?

(Testimony of L. H. Braicks.)

A. Our attorney forgot it.

Q. Did you forget anything else in this plan to organize a new corporation?

A. No, I don't think we did.

Q. Your sole purpose was to get a higher capitalization for income tax purposes?

A. In the meantime, increase our capital.

Q. You knew you could increase your capital without reorganizing?

A. Yes—the laws change so often.

Q. You had increased your capital before various times and hadn't reorganized?

A. No, but tax laws were different.

Q. Was it your understanding that the tax law had anything to do with the increase of the capitalization under the State Statute, was that your understanding?

A. No, we weren't sure, under reorganization, declared new value.

Q. You weren't sure upon reorganization?

A. No.

Q. If you could have reorganized and gotten an increase in capitalization, that is the way you would have handled it?

A. We might.

Q. You intended to do that?

A. I don't know.

Q. You didn't change the corporate setup a bit except to increase the capitalization, did you? [103]

A. Yes, that was the main purpose, yes.

Q. You went on with the same books, you took



(Testimony of L. H. Braicks.)

over the liabilities of the old corporation and you also assumed the liabilities and took over the assets?

A. Yes.

Q. Went right on operating?

A. Didn't "assume"—we distributed them among the stockholders and they were paid with their assets.

Q. Other than the preparation of this analysis and reporting on your income tax return, what did you do in this reorganization? You discussed it?

A. Yes, discussed and instructed our accountant to figure out what our net worth was; told our attorneys to go ahead and make out the necessary papers. That is all we could do.

Q. Did you get new books for the new corporation?

A. I don't remember whether we set up—yes, we must have set up an entirely new set of books.

Q. The procedure you adopted here was entirely upon the advice of your tax consultant, is that right?

A. Yes, we put our problems before him; that is what he advised us to do.

Mr. Winter: That is all, I think.

### Redirect Examination

By Mr. Jones:

Q. Mr. Braicks, Counsel asked you if you intended to have the assets of the old company go to the new company. I don't remember exactly

(Testimony of L. H. Braicks.)

what your answer was. What was your intent with respect to the transfer of the assets [104] the old company, to whom did you understand they were going to go?      A. The assets?

Q. Yes?

A. To the stockholders of the old corporation.

Q. Did you understand that there was any direct relation between the old company and the new company, except as it went through the stockholders, who might in turn pay for their stock by turning in the assets?

Mr. Winter: I object to that as leading, if the Court please, not proper redirect examination.

The Court: It is leading, Mr. Jones.

Mr. Jones: It probably is leading, but I am trying to get at what Counsel asked him.

Q. I will ask you this: how did you understand that the new company was going to get the assets of the old company, if it did get them?

A. Well, the stockholders subscribed for a certain amount of shares and paid for these shares by assigning or turning over their share of the assets to this new corporation.

Q. And, where had they gotten the assets, according to your understanding?

A. When told what their share was.

Q. From what?

A. From the statements Mr. Scott made up.

Q. But, from what source did they get those assets, as you understood?

A. You mean——?

(Testimony of L. H. Braicks.)

Q. How did the assets go to them? [105]

A. I don't quite understand what you mean?

Q. Well, you say the stockholders got the assets, from what source did they get the assets?

A. We told them how much each share was.

Q. I don't mean exactly, where did they get the information what the assets were, whose assets was it that the stockholders were getting?

A. Of the old Pommerelle, Inc.

Mr. Jones: I think that is all.

#### Recross Examination

By Mr. Winter:

Q. May I ask—? You filed claim for refund for the tax you reported? A. Yes.

Mr. Winter: I think that is all.

(Witness excused.)

Mr. Jones: I want to call Mr. Molz back for one question.

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J. G. MOLZ,

recalled.

#### Direct Examination

By Mr. Jones:

Q. I may be a little confused in my understanding of your testimony, as I recall I asked you if you recalled any discussion between the stockholders at about the time of the dissolution, with reference to what would be done as to the share of any stockholder who did not [106] want to go in the

(Testimony of J. G. Molz.)

new company and I thought you said that you didn't recall any such discussion. Was I right or wrong in that understanding?

A. I don't remember making that statement, Mr. Jones.

Q. Did you intend to make that statement in answer to that question?

A. No, I did not; we, naturally, had a number of discussions at the time, plenty of them, it was a very serious matter, our entire future at stake, and of course, we were concerned what would happen in the future; it was quite apparent, all of us were more or less interested in saving whatever we had and we had accomplished during that time and naturally——

Mr. Winter (Interrupting): This is all a conclusion of this witness. We want the facts.

Q. What was the purport of the discussions, with respect to what would be done as to any stockholder who might want to stay out of the new company?

A. Well, he would have an opportunity to sell his old.

Q. Do you remember what individuals expressed the willingness and ability to take over any such holdings?

A. I remember Mr. Buschmann, Mr. Vanderpek and Mr. Braicks and I, personally too.

Mr. Jones: That is all.

Mr. Winter: That is all.

(Witness excused.) [107]

Mr. Jones: I presume we can now take up the depositions?

Mr. Winter: If Your Honor desires we read the depositions to Your Honor? I suggested to Counsel Your Honor could probably read the depositions.

The Court: What about any objections to the questions?

Mr. Winter: Just as to the materiality.

Mr. Jones: That will be perfectly agreeable to me. You will get them just as well from reading them and they are very largely cumulative of the testimony that has already been offered.

The Court: Suppose I take a 10-minute recess and read them?

Mr. Winter: I think Your Honor will probably hear them better.

Mr. Jones: There is a correction on one witness's testimony. Is that incorporated in there?

Mr. Winter: We do object to that purported correction. I am advised by the Reporter that the deposition in its original form, as shown by his notes, is the original deposition. The correction appears to have been made yesterday or signed yesterday and not in my presence or did I have an opportunity to cross-examine him, as we did on the deposition.

Mr. Jones: I think you will find that strictly in accordance with the Statute. Mr. Greb spoke to me about it, said the witness refused to sign the deposition, originally as he gave it. I don't think,

until this correction is made—[108] Mr. Greb dictated the correction at the time he signed it.

Mr. Winter: Signed the original at the time Mr. Greb dictated this. We understood he would come in later.

Mr. Jones: I understand he signed it only on making the explanatory statement. Mr. Greb spoke to me about it and we got out the rule and the rule says, as I recall. I think it is Rule 34, that the testimony shall be signed by a witness and if he wants to make any explanation or change in his testimony, he shall advise the reporter of how he thinks it should be and the reporter shall take down the explanation, and up to that time the witness had refused to sign the statement because he said it wasn't what he intended and I told Mr. Greb—

Mr. Winter (Interrupting): That is not a correction within the rule. He admits—signed the deposition—what he testified, that is what we want, not what he later may have intended and wants to correct his deposition.

The Court: If I understand Mr. Jones' statement, it was not correctly reported, and he signed the deposition contingent upon the fact that the correction would be made. Is that correct?

Mr. Greb: (The Reporter who took the deposition) Yes.

Mr. Winter: If the Court please, I call Your Honor's attention to the proposed correction, reason for making the correction "the reason for mak-

ing the correction, I was confused and misunderstood, the [109] questions. He doesn't deny he so testified.

Mr. Jones: I understand the Reporter's notes were correct but the witness said that wasn't what he intended to say. I wasn't there when this was done. I told Mr. Greb what the Rule was, told him to go ahead and work it out with the witness, Huletz.

The Court: Does he live in Seattle?

Mr. Jones: Yes, he lives in Seattle. Page 37.

The Court: I have it here.

I will admit it with the understanding if you want the right of cross-examination——

Mr. Winter: This is new testimony—no right to cross-examine him.

The Court: If you want the right to cross-examine him, you will be given that right.

Mr. Winter: I would like to leave it this way if the Court please—I may or may not. I don't think that the case is going to fall or rise on this point. I don't like to ask to hold up the case but it seems to me——

The Court (Interrupting): I will tell you after I read it if I think it is important; if I tell you I am not considering it of any importance, you don't need to take further deposition; if I consider it important, you can cross-examine him further.

Mr. Winter: We recognize that the witness did give some damaging testimony, as far as the plaintiff is concerned.



The Court: We will take a recess, subject to call.  
(Recess.) [110]

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The following depositions were submitted to the Court:

Mr. Jones: Dr. Leede, will you be sworn?

C. S. LEEDE,

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your name, please?

A. C. S. Leede.

Q. You reside here in Seattle, do you not, Dr. Leede?      A. Yes.

Q. Were you a stockholder in the Pommerelle Company, Inc., in 1937?      A. Yes, I was.

Q. I believe that there were three other parties by your same family name, William E. Leede, Dorothy Leede and Eleanore M. Leede, who were also stockholders?      A. Yes.

Q. Who were those several persons?

A. They are my children.

Q. And who represented them, if anyone except themselves, in matters relating to the Pommerelle Company?

A. I was their representative.

(Deposition of C. S. Leede.)

Q. Were they living here during 1937?

A. No. The boy was in Wisconsin, Madison, Wisconsin; and [111] the girl was in Chicago.

Q. Well, when you say "the boy", that would be William E., I assume? A. Yes.

Q. And the girl would be Dorothy?

A. The oldest girl, Dorothy.

Q. And was Eleanore M. a daughter too?

A. Yes.

Q. Where was she?

A. She was here in Seattle.

Q. Where are those several individuals now?

A. Well, the boy is in Springfield, Missouri; and the oldest daughter is in Houston, Texas; and the youngest is still home.

Q. Did any of those several children personally participate in meetings, or affairs, of the Pommerelle Company in 1937, or did you represent them entirely?

A. Well, I can't say that. If they were not in the city, they didn't. When they were in the city, they occasionally did go down; but as a rule, they paid no attention to it, because they knew none of the affairs. I was their representative.

Q. I call your attention to the call and waiver of notice that I submitted to Mr. Buschmann, and ask you if that is your signature on that, Dr. Leede?

A. Yes, that is my handwriting for all of them.

Q. And the signatures of Eleanore, Dorothy and William appear there also?

(Deposition of C. S. Leede.)

A. All my handwriting.

Q. That is in your handwriting? [112]

A. Yes.

Q. Did they attend that meeting? A. No.

Q. And did you represent their interests there at the meeting? A. Yes.

Q. Now, do you recall this meeting, and generally what was the subject of discussion at that meeting?

A. Yes, I recall. They were to dissolve the company and organize a new company, which was, as Mr. Buschmann said, legally done. The purpose of that, as I understood, was that our declared value was too low, or something like that, and that we could only increase that by dissolving the company, and that would give us certain tax privileges which we could legally take advantage of.

Now, do you recall whether or not at this meeting there was any discussion of whether the shareholders of the Pommerelle Company, Inc., the old company, would necessarily go over into the new company, or would have any option of selling out?

A. I think we had the option of selling out.

Q. Well, on what do you base that statement? Was there discussion of the matter at that meeting?

A. There was a discussion on that matter, but I don't know who said it, and I don't know, but that has always been my understanding that we could have done that.

(Deposition of C. S. Leede.)

Q. Well, is it your recollection that statements were made on that subject at the meeting?

A. Yes, that is my recollection.

Q. To what effect, Doctor? [113]

A. Well, that those that didn't want to come along could get out.

Q. Did you take stock in the new company?

A. Sure I did.

Q. And were you advised at any time afterwards about the amount of profit that you should report on the liquidation of your stock?

A. I haven't that with me, but I know I received a similar letter.

Q. You received a communication similar to that which Mr. Buschmann has identified as having been received by him, did you?

A. Yes. It was more extensive than that, because it was broken down for the children so that each one of the children would have to pay.

Q. You received the notification for yourself and for the children, did you?      A. Yes.

Q. Did you make an income tax return for that year?      A. Yes.

Q. Did you include in your income tax return, as income, the profits that you were advised you should report?

A. I personally did, yes.

Mr. Jones: Have you his return?

Mr. Winter: Yes.

Q. (By Mr. Jones): Mr. Winter has produced

(Deposition of C. S. Leede.)

a photostatic copy of your return, Doctor. Can you identify that as a copy of your return?

A. That is my handwriting.

Q. And your signature to it?

A. That is my signature. I didn't fill it out.

[114]

Q. And are you willing that this return be produced and inspected in the course of the trial of this cause? A. Certainly.

Q. You are? A. Yes.

Q. Did you pay the tax that was shown to be due on your return?

A. I presume I did. I haven't been dunned yet.

Q. And have you ever claimed any refund from the government of any part of your tax on account of the profit on the Pommerelle Company, Inc., stock? A. No.

Q. Do you remember, Doctor, whether at this meeting of September 30, 1937, for dissolution, any statement was made to the stockholders about the profits that would be reportable as income if the company was dissolved?

A. I don't recall the figures, but I do know that—I don't know what we were capitalized for—was it \$80,000 or something like that?—and they said that it isn't the value of the affair, and it should be up higher; and I am no accountant, so I took their word for it.

Mr. Jones: That is all.

(Deposition of C. S. Leede.)

Cross Examination

By Mr. Sager:

Q. Doctor, as I understand you, your impression that you got from the information and advice given you at that meeting was that, in order to get a higher declared value on the stock of the company for tax purposes, [115] it was necessary to disincorporate and reorganize under a new declared value? A. That was my impresison.

Q. And that information was given to you at this meeting on September 30, is that right?

A. Now you are asking me something that I——

Q. (Interrupting): Well, I will change that. Was it discussed at that meeting?

A. Oh, yes, we had discussion.

Q. Did you have any other meetings pursuant to this general scheme of disincorporating and re-incorporating, or reorganizing a new corporation?

A. I think our Board of Directors, the officers meet and formulate this, and then the stockholders are called in. I really don't know. We haven't had any regular meetings, so I couldn't say.

Q. But you recall being at this meeting on September 30?

A. This meeting, yes, I recall that.

Q. Do you recall being at another meeting along about that same time, within a matter of a week or two of that same time?

A. That is possible.

(Deposition of C. S. Leede.)

Q. Now, Doctor, sometime along there you signed a subscription for the stock in the new corporation, didn't you?      A. Yes.

Q. You stated here to Mr. Jones that the call and waiver of the first meeting of the new corporation—this was the old corporation, was it not? The call of September 30 that you signed for yourself and your children, is that true? [116]

A. Yes.

Q. Now, did you also, on the subscription for stock in the new corporation, did you sign the names of your children there, too?

A. I probably did. I would have to see.

Q. I will show that to you, Doctor, and ask you if this is your writing?

A. No, that isn't my writing.

Q. Is that the writing of your children in each instance?

A. No. No, that isn't my handwriting, no.

Q. And it is not the writing of your children either?

A. No, that isn't the writing of my children.

Q. Do you know who signed that for you, Doctor?

A. I don't know. I don't recognize the handwriting. It isn't Mrs. Leede's. I don't know.

Q. It is not your handwriting?

A. It isn't my handwriting.

Q. And these other names of Eleanore M. Leede and Dorothy and William Leede are not the handwritings of those children of yours?



(Deposition of C. S. Leede.)

A. No. They couldn't sign it, because they weren't here.

Q. You were acting for them? A. Yes.

Q. With respect to this corporation during that period of time? A. Yes.

Q. What portion of the total stock in the old company did you and your children own together, Doctor?

A. Well, at first the children subscribed alone. They had one-tenth—I think it was one-tenth, wasn't it? And [117] then one of the stockholders went out, and I bought part of his stock. Now, I don't know when that was. I wasn't an original owner personally, but my children were, and I was taking care of their affairs for them; so we had I think eleven, maybe eleven and a half per cent or something like that.

Q. In the old company?

A. In the old company.

Q. You had that at the time of its dissolution?

A. Yes.

Q. And you took that same proportion of stock in the new company? A. Yes.

Q. That is, you and your children together?

A. Yes.

Q. Do you know, Doctor, that that was the same manner in which the other stockholders changed their holdings from one to the other of the corporations? A. Well, I imagine it was.

Q. Was that the general understanding among

(Deposition of C. S. Leede.)

the stockholders at this meeting, that they would hold the same stock in the second corporation that they held in the first corporaion?

A. May I put it this way: We were all entitled to hold the same proportion in the other corporation. I would put it that way rather than the other way.

Q. And his subscription for stock is on that same basis, is it not?

A. Yes, that is on the same basis.

Q. Now, you say, Doctor, that you understood you could dispose of your holdings? [118]

A. Yes, sir.

Q. That, of course, was true at any time? You could have sold this stock pretty nearly any time, couldn't you?

A. I didn't want to.

Q. I know, but I say you could have?

A. I could have, yes, certainly.

Q. And at this meeting, the proposal for taking up this stock of anyone who cared to dispose of it was an offer on the part of Mr. Braicks to purchase it?

A. I won't say it was an offer on the part of Mr. Braicks. I think it was on the part of any individual.

Q. Well, was there any other individual there that offered to buy stock?

A. I don't know that anybody offered to, but I certainly would have.

Q. You would have been willing to buy additional stock?

(Deposition of C. S. Leede.)

A. I would have been willing to buy some more stock.

Q. That was the only way, of course, that you could have disposed of it, by selling to some one of the other stockholders?

A. We are supposed to offer first to our fellow stockholders before we go outside the corporation.

Q. Was that the understanding among the stockholders?

A. That was a gentleman's agreement which we had from the start.

Q. A gentleman's agreement?      A. Yes.

Q. Did that carry over into the new corporation?

A. I don't know whether that—we among ourselves have always felt that way about it, that we should have the privilege of buying first. [119]

Q. Was Mr. Scott at this meeting of September 30?      A. Oh, yes.

Q. Did he submit these various papers for you to sign at that time?

A. I don't know whether he submitted them at that time or whether we just passed the resolution, or whether we came together at a later time to sign up the subscription for the stock. I couldn't tell you that. I don't know.

Q. I notice, Doctor, that this subscription—now, of course, you didn't sign this, did you, Doctor?

A. I may have. I don't know whether I gave a proxy to somebody to sign it for me. Those are not

(Deposition of C. S. Leede.)

my signatures. That is not my signature, and I don't know—was this around Christmas time? The children were home at Christmas and one or the other might have signed. But it doesn't look to me—this is not my handwriting and this could be Dorothy's, but I don't know. This is my handwriting.

Q. This is your handwriting?

Mr. Jones: Well, now, referring to what?

Q. (By Mr. Sager) Doctor, this that you say is your handwriting refers to a communication dated September 30, 1937, addressed to the Board of Directors of the Pommerelle Company, Seattle, Washington, and that was signed by you?

A. That was signed by me.

Q. And also the names of Eleanore M. Leede, Dorothy Leede and William Leede are written in your handwriting?

A. That is my handwriting. [120]

Q. And that is a proposal to the new company, in which you offer to sell, assign, transfer and turn over to The Pommerelle Company, in full payment of our individual subscriptions, our undivided ownerships and interests in the assets shown upon the attached list, subject to all liabilities which The Pommerelle Company is to assume and agree to pay?

A. Yes.

Q. In other words, you made this proposal to the new company, to turn over your interest in the old company in payment of your subscription of stock, is that correct?

A. Yes.

(Deposition of C. S. Leede.)

Q. Was that produced at that time?

A. What do you mean?

Q. I mean was that signed at that same meeting?

A. I couldn't tell you that, whether it was signed the same day or whether it was signed a few days later.

Q. Do you know whether or not it was signed on the date it bears?

A. I presume it was. I don't believe I looked at the date.

Q. Now, this meeting that you were holding, Doctor, was a meeting of the stockholders of the old company, that is correct, isn't it?

A. Yes.

Q. And at that same meeting, you subscribed for the stock of the new company?

A. Yes.

Q. And you——[121]

A. (Interrupting) I don't know whether I subscribed, whether we subscribed that day on the same thing. I can't recall, or whether it was a few days later. I wouldn't make that statement that on that date I signed it, but those are my signaures.

Q. Well, if there was another meeting concerning this whole transaction, it was right about the same time, within a few days or a week or so?

A. Yes, I think so.

Q. And you then offered to transfer your holdings in the old company to the new company?

A. Yes.

Q. For your stock in that new company, and the other stockholders did likewise?

A. Yes.

(Deposition of C. S. Leede.)

Q. And that was the understanding among you at that time, was it not, subject to the right of any one of you to sell? A. That is it, yes.

Q. To one another? A. Yes.

Q. But you all knew that the same assets in the old company were going over to the new company?

A. Yes.

Q. The advice given to you during the course of these proceedings, was that given to you by the directors or by Mr. Scott?

A. I think Mr. Scott was the one that explained the whole procedure to us.

Q. He is the one who outlined this plan for you gentlemen?

A. He amplified it and gave us the information.

[122]

Q. And it was upon his advice that you acted?

A. He acted as our adviser, I would put it that way.

Q. And these so-called best interests of the company that were spoken of by Mr. Buschmann, your understanding of that was that it would achieve a higher declared value on the stock?

A. Well, we were—yes. Now, I don't know value or declared valuation and taxable stuff; I am not a business man to know that, and I think there are two questions always there, on reorganization or declared valuation or taxable valuation, or what it is I don't know; but I had the impression that if

(Deposition of C. S. Leede.)

we would say that it is of a higher declared valuation, we would have to pay a higher tax, a corporation tax, but we would have a higher earning figure before we would come into the surtax or whatever it might be, something to that effect. Now, I may be all wrong.

Q. In simple language, Doctor, you were going to cut down the amount of tax the corporation was going to pay?

A. Yes, that is the point, that we would be able to have larger returns without having surtax, or something like that.

Q. And that was about the only change in the company, wasn't it? A. Well——

Q. What I mean, Doctor, you didn't change your operations, your mode of business?

A. No, but we were—we got where we could, on \$500,000, we could make 5% or 6% on that, and that was more than you could make on \$80,000, something to that effect. [123]

Q. You don't mean that you actually increased the amount of profit to the company by this reorganization? A. No, but we could——

Q. (Interrupting) You saved some on the tax?

A. We could have gone up; we would have saved tax, yes.

Mr. Sager: I think that is all.

Mr. Jones: That is all.

(Witness Excused.)

(Signed) C. S. LEEDE.



ED HULETZ,

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Jones:

Q. State your name, please.

A. Ed Huletz.

Q. Were you a stockholder of Pommerelle Company, Inc., in 1937?           A. Yes.

Q. Showing you the call for special meeting of stockholders of September 30, 1937—I was going to ask you if your signature was on it, but I don't see that it is here. I will ask you, however, if you recall attending that meeting which dealt with the matter of dissolving the company?

A. Yes, I am quite certain I was there. [124]

Q. And do you recall what, if any, discussion there was relative to any opportunity afforded the stockholders either to receive the liquidation interest of the company, or to receive the equivalent in cash?

A. Yes, that was—I don't know if it was brought up at that meeting. I know distinctly I had the opportunity of doing either one.

Q. And can you state in substance what the information was that was given to the stockholders on that point?

A. That would be hard for me to do.

Q. Well, just state the substance of it, the fact of it. I don't mean the language.

(Deposition of Ed Huletz.)

A. The impression I had was that we had a chance to sell our stock at that particular time, or go on into the new company.

Q. And if you sold your stock, did you understand what you would get for it?      A. Yes.

Q. How would that be determined?

A. I couldn't tell you. I remember to this extent, that our stock would have been better by coming into the new company. I think we would get some additional stock.

Q. Did you receive any advice from the company or anyone on its behalf as to the amount of profit you should report on your stock in connection with the dissolution?

A. Yes, I did at that time.

Q. Did you receive a communication substantially in the form of this communication which Mr. Buschmann has identified? [125]      A. Yes.

Q. And did you report the amount of profit that you were advised had accrued to you on the transaction in your income tax return?

A. I don't know if I was in California at the time that that was forwarded to me, or if I was in Seattle. I remember of mailing it to my accountant at that time, and it was supposed to have been reported.

Mr. Jones: Have you Mr. Huletz' return?

Mr. Winter: He didn't file one as far as I recall.

The Witness: What year is that for?

(Deposition of Ed Huletz.)

Mr. Jones: For 1937.

The Witness: When is that due?

Mr. Winter: March of '38.

Q. (By Mr. Jones) Do you know whether or not you did file a return for 1937?

A. I didn't check, but it should have been, because I had an accountant at that time, Mr. J. W. Langford. I will check. However, at that time I had sold—I had a garage out in the Mount Baker District. I had sold that. However, I was informed by Mr. Chilberg, from the Internal Revenue, who phoned me and asked me about my place of business out in Mount Baker, asking me to come down——

Mr. Winter: (Interrupting) Is it the Mount Baker Garage?

The Witness: Yes, sir.

Mr. Winter: I was sure that that wasn't the return, Mr. Jones; but after seeing it now, I have it here. [126] I had difficulty getting this particular return. They sent me another one. Yes, I have it here. Do you want to ask him if that is his signature?

Mr. Jones: Yes, if you will submit it to him.

Mr. Winter: I will ask him if it is his signature. I will just show him the signature.

Q. (By Mr. Jones) Mr. Winter is showing you a return for 1937.

A. Yes, and that is my wife's.

Mr. Winter: E. A. Huletz and Madelyn L. Huletz.

(Deposition of Ed Huletz.)

Q. (By Mr. Jones) And are you willing that the return be received and inspected in connection with the trial of this case, Mr. Huletz?

A. Yes.

Q. As far as you recall, did you pay the tax due as shown on this return?

A. Well, I paid whatever tax—I am sure I did.

Q. And have you received any refund of tax on account of the profit on this liquidation of the Pommerelle Company, Inc. stock? Have you ever received any tax refund from the Government?

A. Not to my knowledge.

Mr. Jones: That is all.

Mr. Winter: Mr. Jones, did he state he had no objection to using the return?

Mr. Jones: Yes, he said that was all right. [127]

### Cross Examination

By Mr. Winter:

Q. Who prepared your return, Mr. Huletz?

A. Mr. J. W. Langford. He is an accountant.

Q. You don't know whether or not you did report any income from this so-called liquidation, do you?

A. No. However, I am sure I told him.

Q. Well, just refer to your return.

A. Well, is it listed?

Q. I don't find it. Now, maybe you can find it.

A. No.

Q. Do you find that you reported it?

(Deposition of Ed Huletz.)

A. No.

Q. You didn't report any profit? A. No.

Q. How many shares of stock did you own in the corporation at that time?

A. I don't remember.

Q. Do you recall what amount was set forth in the instructions to you as to how you should report the profit that you should report, by Mrs. Pfisterer of the Pommerelle Company? Do you recall how much that was? A. No, I don't.

Q. When did you sell your stock in the new company?

A. I started a new business—I think it was in '38.

Q. Were you working for the old company at one time?

A. No. Oh, partially. No, I wasn't either.

Q. I beg your pardon? A. No.

Q. You don't recall when you purchased the stock, do you, [128] in the old company?

A. No, sir.

Mr. Jones: Do you want me to show you what I have here?

Mr. Winter: Yes, if you would.

Mr. Jones: The information that I have from the schedule prepared is that Mr. Huletz owned 595 shares, of which 350 was acquired on June 10, 1935, and 245 on December 14, 1936. Do you want me to state what the schedule shows as to cost and his reportable profit?

(Deposition of Ed Huletz.)

Mr. Winter: I think I have it here.

Q. (By Mr. Winter) Do you recall approximately what profit you were advised that you were to report upon this transaction, in connection with the liquidation and formation of the new corporation? Do you recall now the amount, approximately?

A. No, I really don't.

Q. Was it a hundred dollars? \$200.00?

A. To tell you the truth, I don't know how much stock I bought originally.

Q. Well, did you attend any of the meetings of the corporation? A. Not many.

Q. To whom would you give your proxy?

A. Oh, I would usually drop it off at the store, Mr. Molz here.

Q. Are you a friend of Mr. Molz?

A. Yes, sir.

Q. Is that how you became associated in the company? A. Yes, sir.

Q. What did you understand as to what you were to receive [129] for your stock in the new corporation, in the event you wanted to sell it? I mean, what did you understand you would receive for your stock in the old corporation in the event you wanted to sell it at that time?

A. Well, I think the present share that was prevailing at that time, the present amount the stock was valued at.

Q. Did you attend the meeting of September 30?

A. I think I did, yes.

(Deposition of Ed Huletz.)

Q. What did you understand was the purpose of forming the new corporation?

A. Well, it was similar to the statements I have heard here, and that was that it was a benefit for the stockholders and the company to dissolve the old one and organize a new company.

Q. Did you understand that the same stockholders were going into the new company?

A. Well, I didn't know all the stockholders.

Q. Well, the ones you knew, you understood they were going into the new company?

A. Well, I knew Mr. Molz was. Other than that, I didn't know. No, I didn't. I knew some were going in.

Q. You knew it was just a matter of procedure whereby you would turn in your old stock and get new stock in the new corporation, is that right? So far as you were concerned, that is all that concerned you, wasn't it?

A. Well, no, it wasn't. At that time I wasn't interested. I figured I didn't want to sell my stock, and they were dissolving the company, so I just more or less assumed that there would be some drop out and be some new stockholders come in. [130]

Q. You just assumed that? A. Yes, sir.

Q. You were not present at many of the meetings? A. No, sir.

Q. To know what was discussed? You just were going along with them as to what they were doing, is that right? A. Well, yes.



(Deposition of Ed Huletz.)

Q. Did you understand that one of the purposes of the dissolution of the corporation was to increase the capital stock, that may be accomplished by dissolving the old corporation and organizing the new corporation? Is that what you understood?

A. Well, there were several things. However, I didn't pay much attention to it.

Q. Didn't you know about it?

A. Yes, I knew about it, that we were dissolving the old company and there was a new company going to be started.

Q. With the same assets?

A. Well, I didn't even pay any attention to that.

Q. You didn't pay any attention to that?

A. No, sir.

Q. Did they ever offer to buy your stock?

A. Oh, yes.

Q. When? Prior to the meeting, or subsequent?

A. Prior and afterwards.

Q. You did sell your stock, did you not?

A. Yes, sir.

Q. In 1938? A. Yes, sir.

Q. Who did you sell it to? [131]

A. To the Pommerelle Company, Mr. Molz.

Q. Mr. Molz?

A. I don't remember. I turned it in.

Q. The way I understand it, then, you were relying on whatever Mr. Molz did was satisfactory with you, is that right, in connection with your stock ownership? A. No.

(Deposition of Ed Huletz.)

Q. You relied upon Mr. Molz, didn't you, when you went in the company?

A. Well, in what way?

Q. Well, you believed in the company when you went into it, didn't you? A. Yes.

Q. And you gave Mr. Molz from time to time your proxy to represent you as a stockholder?

A. Yes.

Q. And you knew that whatever he did was satisfactory with you, is that right? A. Yes.

Q. And whatever he did in connection with the liquidation and subscription to new stock, it was satisfactory to you? A. Yes.

Q. You didn't sign a subscription blank, or did you sign a subscription for stock in the new company? A. I think I did.

Q. I will show you this sheet from the minute book of the company, and ask you if your signature appears on that subscription? A. Yes.

Q. When did you sign that, Mr. Huletz? [132]

A. I couldn't tell you.

Q. Well, was it before the meeting, the first meeting of the new company?

A. I couldn't tell you. I don't know.

Q. As a matter of fact, didn't you hear the situation discussed by other stockholders, other than Mr. Molz? I mean, the affairs of the corporation, as to what they were attempting to do?

A. Yes.

Q. Who else was it discussed by?

(Deposition of Ed Huletz.)

A. Mr. Braicks that I remember. Other than that, there might have been somebody else. No other name to my knowledge.

Q. Did you ever hear Mr. Scott discuss it?

A. Yes, I think so.

Q. Was that at one of the meetings you attended?

A. Yes, I did hear Mr. Scott.

Q. Did you hear Mr. Scott discuss that it would result in savings of tax if such a procedure was adopted?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No, sir.

Q. Who did you hear make such a statement, if you did?

A. I don't recall that I did.

Q. What did you understand was the purpose of liquidating the corporation and organizing a new corporation?

A. Well, to get a higher value for our stock.

Q. You knew that that was to avoid, or legally avoid—attempt to legally avoid the excess profit tax on low capitalization, is that right? [133]

A. Not to my knowledge.

Q. Well, you know that to be a fact, do you not?

A. No, I don't.

Q. You don't?

A. No, sir.

Q. You don't know very much about this thing, do you, Mr. Huletz?

A. No, sir; I did not.

Q. And whatever was done, was done by your friend Mr. Molz, was it not?

A. Well, I couldn't say that I would place the responsibility on him. I just put stock in the

(Deposition of Ed Huletz.)

company and let it ride, and I didn't pay any attention, because, to tell you the truth, it was such a small amount.

Q. You understood that if you just let it ride, then, that you would just get stock in the new corporation in the same proportion that you had in the old corporation, except for the higher capitalization, is that right?

A. Well, will you repeat the question?

Q. I will strike it, and I will put it this way: Did you understand that you were to receive stock in the same proportion in the new corporation that you owned in the old corporation?

A. Well, I knew we were going to get stock. I didn't know in what proportion.

Q. Well, you were turning in all of your stock?

A. I was surrendering all of my stock and not exchanging it for new stock in the corporation.

Q. For the stock in the new corporation?

A. No, but I was purchasing stock in the new corporation. [134]

Q. And that is what you understood to be a fact, wasn't it?

A. Yes, as I have stated above.

Q. That you were turning in your stock?

A. No, I was surrendering my stock.

Q. And you were receiving stock in the new corporation?

A. No, I was purchasing stock in the new corporation.

(Deposition of Ed Huletz.)

Q. Now, in case you sold your stock, as you say that they offered to purchase it, what did they say they were going to pay you for it?

A. Oh, there was no amount set on that.

Q. You weren't desirous of selling, I take it?

A. No, sir.

Q. Did you have an understanding with the rest of the stockholders that you couldn't sell your stock except to one of the other stockholders?

A. No.

Q. Who did you purchase your stock from, did you say?

A. From Mr. Molz, from the Pommerelle Company.

Q. Who do you say your accountant was that you told that he should include—that you sent this statement which was furnished to you by the Pommerelle Company relative to your profit on this transaction?

A. J. W. Langford.

Q. Did you send it to him?

A. Yes.

Q. Have you inquired as to whether or not he ever received it?

A. Well, I—no, I never inquired. I just assumed that it was all taken care of.

Q. Do you recall whether or not you were advised to report a profit of \$640.98? [135]

A. Who by?

Q. By the secretary of the Pommerelle Company?

A. Yes, I understood that there was an excess

(Deposition of Ed Huletz.)

profit there that we were supposed to pay our income taxes—we were supposed to pay tax on that.

Q. Have you asked your accountant whether or not he ever received the letter on which you told him to report it? A. No.

Q. You signed your return?

A. Yes, I did.

Q. You read it before you signed it?

A. Very poorly.

Q. Well, isn't it a fact that the reason why you didn't include that is because you didn't have a profit because you didn't sell your stock?

A. Well I will have to take that up with my accountant.

Q. Well, didn't you understand that you were not selling your stock, but you were merely trading it for stock in the new corporation?

A. Yes.

Q. And as long as you didn't sell your stock, that you would have no taxable profit?

A. I thought we were supposed to—there was an increase at the exchange, wasn't there, when we switched the stock?

Q. You mean an increase in the value of the stock? A. Yes.

Q. Did you understand you were selling your stock or not?

A. No, I wasn't selling it.

Q. You were trading it for stock in the new corporation? A. Yes, sir. [136]

(Deposition of Ed Huletz.)

Q. Is that your understanding? A. Yes.

Q. Who advised you to that effect?

A. I do not remember.

Q. Well, did anyone advise you that that was in effect, what you were doing?

A. That is awfully hard for me to answer.

Q. Why didn't you report it in your return? Is that the only explanation, that you told your accountant to put it in? A. Yes, sir.

Q. How did you tell him?

A. Well, to tell you the truth, I don't know if I was in California at that time or not; if I mailed him that, or if I told him. I have no connections with this accountant at the present time. I haven't had for three years, and he usually fixed up my statement, and I would sign the statement and pay whatever tax I had to pay and I didn't—

Q. (Interrupting) You subscribed and swore to your return in Seattle. You couldn't have been in California when you signed your return.

A. Then I was in Seattle then.

Q. What is the fact now? Were you trading your stock for stock in the new corporation, and thought you didn't have a profit?

A. No; I thought there was a profit.

Q. Why didn't you report that profit?

A. Well, I would say my accountant was to blame for that.

Q. What did you have more after the new corporation was formed?



(Deposition of Ed Huletz.)

A. You mean additional value?

Q. Yes. What did you have additional that you didn't have [137] before?

A. I couldn't tell you. I don't know the amount.

Q. You understood that you were getting that much more money out of the corporation, and you were still having the same stock? Was that your understanding of the matter?

Mr. Jones: What do you mean by "that much more money", Mr. Winter?

Mr. Winter: Well, the witness may know.

Mr. Jones: Well, if you don't know what your question is, I don't know why the witness should know.

Mr. Winter: I do know what the question is, but if Counsel doesn't know——

Mr. Jones: (Interrupting) I asked you what you meant by "that much more money."

Mr. Winter: Well, let's see whether the witness knows what I mean.

The Witness: No, I don't know.

Mr. Jones: You mean you don't know the answer, or you don't know what Counsel means by his question?

The Witness: I don't quite understand him.

Q. (By Mr. Winter) You don't understand me?      A. No.

Q. All right. You say you were expecting to get that much more money? Didn't you say that?

Mr. Jones: No, you were the one that said that, Mr. Winter.

(Deposition of Ed Huletz.)

Mr. Winter: No, I think he said it, and the record will bear me out, I think, that he said he got that much more money, and he was supposed to report it.

Q. (By Mr. Winter) Is that right?

A. Yes. [138]

Q. When you say "that much", you don't remember how much it was? A. No, sir.

Q. And that is the amount that you were advised by the secretary of the company in a letter that you should report? A. Yes, sir.

Q. Well, did you understand that you had sold your stock? A. No.

Q. Well, then how did you understand that, if you didn't sell your stock or dispose of it, that there would be a profit to you?

A. Well, I just more or less assumed that our stock had increased that much, increased in value.

Q. Did you ever authorize the liquidation of the old corporation?

A. I was in favor of it.

Q. Did you ever sign any statement that you had authorized the liquidation of the corporation?

A. I don't remember.

Q. You don't remember? A. No, sir.

Mr. Winter: That is all.

### Redirect Examination

By Mr. Jones:

Q. Are you quite clear, Mr. Huletz, that you did convey to your accountant, Mr. Langford, the

(Deposition of Ed Huletz.)

information that was given to you by the company as to the amount of [139] profit that you should report on the transaction?

A. Yes, to my knowledge.

Q. Counsel has asked you whether you understood you were trading stock in the old company for the new company. I am not asking you what your understanding is, but I will just ask you if you signed the subscription here which is in the minute book of the new company, which I will show to you, under date of September 30, in which it is stated that the undersigned offer to sell, assign, transfer and turn over to The Pommerelle Company, in full payment of our individual subscriptions, our undivided ownership and interest in the assets shown upon the attached list, subject to all liabilities which The Pommerelle Company is to assume and agree to pay? Now, do you find whether you signed that or not?

A. Yes. That is my signature.

Q. That is your signature, the last one on that page?

A. Yes, sir.

Q. And what were the assets in which you were assigning an interest there? What were those assets that you were assigning and turning over your interest in them for stock in the new company?

A. What do you mean, dollars and cents?

Q. No. You say you offer to turn over your undivided ownership and interest in the assets shown upon the attached list. Do you remember

(Deposition of Ed Huletz.)

what those assets were, whether they were the properties of the old company?

A. I would say yes.

Mr. Jones: That is all.

Mr. Winter: That is all.

(Witness Excused.) [140]

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GILBERT M. KROLL,

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your name?

A. Gilbert M. Kroll.

Q. Were you a stockholder in the Pommerelle Company, Inc. in 1937, Mr. Kroll?

A. Yes, I was.

Q. Were you the owner of 850 shares in that company?

A. I don't remember the amount.

Q. Showing you the call for a special meeting of stockholders to be held on September 30, 1937, I will ask you if you signed that?

A. Yes, I did.

Q. G. M. Kroll is your signature, is it?

A. That is right.

Q. Did you attend that meeting?

A. I did partially, I imagine.

(Deposition of Gilbert M. Kroll.)

Q. And do you remember whether or not there was any discussion at that meeting to the effect that a stockholder who didn't want to continue could have some action taken about disposing of his stock?

Mr. Winter: I don't think Counsel needs to lead the witness.

Mr. Jones: Well, I am trying not to lead the witness.

A. I don't remember just what was said at that particular meeting, because I was more or less in charge of the plant, and I had a lot of other things to do. I was [141] in and out of the meeting. I wasn't there during the entire meeting.

Mr. Sager: I am having difficulty hearing the witness.

Mr. Winter: So am I. Will you speak a little louder?

A. I wasn't present at the entire meeting, so I do not remember what was said all the time in the meeting, because I was in charge of the plant, and I had things to do in the plant, and I had to answer the phone when it rang, I was the youngest one at the meeting, and naturally when something happened, I was the one that had to jump.

Q. (By Mr. Jones) Do you recall, Mr. Kroll, whether you were advised at some later date, by or on behalf of the company, of the amount of profit that should be reported on your return for 1937 on that transaction?

A. Yes, I was.

(Deposition of Gilbert M. Kroll.)

Q. And did you receive a communication substantially of the same character as this exhibit 1 to Mr. Buschmann's testimony?

A. I imagine I did, although I don't clearly remember that I received it.

Q. Did you report a profit on the liquidation of your stock in your return for that year?

A. Yes, I did.

Mr. Jones: Do you have his return, Mr. Winter?

Mr. Winter: I do.

Q. (By Mr. Jones) Mr. Winter is showing you a photostatic copy—— [142]

A. (Interrupting) I have a copy of my return here.

Q. Well, take a look at this one, Mr. Kroll. He is showing you a photostatic copy of your return. Is that your signature? A. That is right.

Q. And are you willing that this return be produced and exhibited and inspected upon the trial of this cause, Mr. Kroll? A. Yes.

Mr. Jones: That is all.

### Cross Examination

By Mr. Sager:

Q. Did you say, Mr. Kroll, that you were working for the company at that time? A. Yes.

Q. Are you still working for them?

A. No.

Q. How long did you work for the new company after the reorganization?

(Deposition of Gilbert M. Kroll.)

A. How long?

Q. I just want to know approximately.

A. Till July 31, 1940.

Q. Do you still own stock in the company?

A. No, I don't. I sold it at that time.

Q. You sold it at the time you quit?

A. Yes.

Q. Do you know what percentage of the stock in the old company you owned?

A. I don't know the percentage.

Q. You don't know the percentage? [143]

A. No.

Q. You were not there at the entire meeting?

A. No.

Q. Were you at any other meetings other than this meeting of September 30?

A. I did attend a few of the meetings, yes.

Q. About that same time?

A. About that time.

Q. Did they all have to do, all of these meetings, with this change from one corporation to the other?

A. Not particularly. We had meetings about other matters.

Q. Did you attend any other meetings than the one you spoke of, which had to do with the change from one corporation to another?

A. Not that I remember.

Q. At that meeting you signed this call and waiver?           A. Yes.



(Deposition of Gilbert M. Kroll.)

Q. Of special meeting of the stockholders of the Pommerelle Company, Inc., did you?

A. That is my signature.

Q. And you signed it at the meeting?

A. Yes.

Q. Did you discuss with any of the other members of the stockholders of the corporation this change-over from one corporation to another?

A. I discussed it with Mr. Molz.

Q. Mr. Molz? With anyone else? A. No.

Q. Did you discuss it with Mr. Braicks?

A. No. [144]

Q. Now, what did Mr. Molz tell you was the purpose of the change-over?

A. Well, we discussed it in a conversational manner in the evenings after we got through work, and I never paid any attention to the actual reason for it. I do remember Mr. Molz telling me that the company was going to be liquidated, and I could sell my stock or I could stay out of the new company that was supposed to be formed, or I could buy myself back into the new company. Since I was working there, I told him, well, I don't imagine I would sell it, because I would put the money in the bank and probably draw it out as fast as I put it in, so I told him I would probably buy new stock in the new company.

Q. Did he tell you why they were making this change from one to the other?

A. Yes, he started explaining to me, but I told

(Deposition of Gilbert M. Kroll.)

him that I left that up to the trustees of the company, because I was too young to realize what it was about.

Q. To what extent did he explain it to you?

A. I don't remember what the details were, because I didn't pay much attention to it. I left it up to them.

Q. You were not a director of the company?

A. No, I wasn't.

Q. Now, showing you a communication directed to the Board of Directors of the Pommerelle Company, dated September 30, 1937, in which the signors offer to transfer their interests from the old company to the new company, did you sign that?

A. Yes. [145]

Q. Your name appears thereon?

A. That is right.

Q. Did you sign that also at this meeting?

A. I imagine at that meeting.

Q. That was a meeting of the stockholders of the old company, was it not? That was at the meeting of September 30 at any rate?

A. I suppose it was. The date is on there.

Q. Now, I am showing you also what purports to be a subscription to stock in the new company and ask you if you signed that?      A. Yes, I did.

Q. Your name is there, and did you sign that at that same time with these other papers?

A. I do not remember.

Q. You do not remember?      A. No.

(Deposition of Gilbert M. Kroll.)

Q. Do you remember signing it at any other time?      A. No.

Q. You don't know when you signed it?

A. I do not remember when I signed it.

Q. In your discussion of this transaction with Mr. Molz, were you told that your interest in the new corporation would be in the same ratio as it had been in the old corporation?

A. I don't remember him making that statement.

Q. Do you know whether or not you acquired the same interest in the new corporation as you held in the old?      A. No, I don't.

Q. How is that?

Mr. Jones: He said he didn't. [146]

A. I don't remember that.

Q. (By Mr. Sager) You don't remember? You made no effort to satisfy yourself about this transaction?      A. No.

Q. You just simply relied on Mr. Molz' word that it was for your good, is that correct?

A. That is right.

Q. To whom did you sell your stock?

A. Dr. Leede.

Q. You sold it to Dr. Leede direct?

A. Yes.

Q. At the time of this meeting, you understood you could sell your stock in the old company?

A. Yes.

Q. Did anybody make you an offer for it?

A. No, they didn't.

(Deposition of Gilbert M. Kroll.)

Q. Did you know to whom you could sell it?

A. No, I never considered it.

Q. How is that?

A. I didn't consider selling it.

Q. They intimated or said at that meeting that you could sell your stock?      A. Yes.

Q. Did they say to whom you could sell it?

A. No.

Q. Was Mr. Braicks there?      A. Yes.

Q. Did he say that he would buy any stock that anyone wanted to sell?

A. I do not remember him saying it, because I wasn't there all the time. [147]

Mr. Sager: That is all.

Mr. Jones: That is all.

Mr. Winter: Mr. Jones, you asked whether or not I had any other returns of stockholders of this corporation.

Mr. Jones: Yes.

Mr. Winter: I have copies of John Kangley and Geraldine Kangley, his wife, a joint return; and of Eleanore Pfisterer; and pursuant to the demand that you made for production of all of the returns of all of the stockholders, the Bureau of Internal Revenue has no record of any returns having been filed, so I am informed, by William E. Leede, Eleanore M. Leede and Dorothy Leede.

Mr. Jones: All right. I overlooked one thing with this witness.

Mr. Winter: And I also have one for F. W. Wonn.

(Deposition of Gilbert M. Kroll.)

Redirect Examination

By Mr. Jones:

Q. Showing you a letter addressed to you February 15, 1938, from The Pommerelle Company, did you receive that letter? A. Yes.

Q. At or about the time it bears date?

A. Yes.

Mr. Jones: I offer it in evidence as part of his deposition. It is just one of those notifications.

(Letter addressed to the witness dated February 15, 1938, from The Pommerelle Company was marked Exhibit 2 by the Notary Public and is attached hereto and made a part hereof.) [148]

Q. (By Mr. Jones) Do you recall whether it had a statement of the details along with it, showing how the amount was arrived at?

A. It must have, because I have the details on my report.

Mr. Jones: All right, that is all.

(Witness excused)

State of Washington,  
County of King—ss.

I, J. W. Greb, Jr., a Notary Public in and for the State of Washington, residing at Seattle in said County and State, do hereby certify:

That the annexed and foregoing depositions of the witnesses August Buschmann, C. S. Leede, Ed

Huletz and Gilbert M. Kroll, on behalf of the plaintiffs, were taken before me and reduced to typewriting under my direction at Seattle, in King County, State of Washington, on the 23d day of October 1941, at 3:00 p. m. pursuant to oral stipulation;

That the above-named witnesses before examination were by me duly sworn to testify the truth, the whole truth and nothing but the truth;

That the said depositions were submitted to the witnesses for examination, and after making any desired changes in form or substance, were then signed by the witnesses in my presence;

That the said depositions as above transcribed comprise a full, true and correct transcript of the testimony given by said witnesses including questions and answers and objections of counsel; [149]

That I am not of counsel nor attorney for either of the parties in the said depositions and caption named, nor in any way interested in the event of the cause named in said caption;

That Exhibits 1 and 2 were identified and offered in evidence, and are attached hereto and made a part hereof.

I have retained the said depositions in my possession for the purpose of forwarding the same by my own hand to the Clerk of the United States District Court at Tacoma, Washington.

In Witness Whereof, I have hereunto set my

hand and affixed my official seal this ..... day of October, 1941.

(Signed) J. W. GREB, JR.

Notary Public in and for the State of Washington,  
residing at Seattle. [150]

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Mr. Jones: I think, in the deposition I have called for the return of those various witnesses who have testified. Have you those here, Mr. Winter?

Mr. Winter: The way I recall it, Your Honor, I think each made no objection, said they could be produced.

The Court: (Indicating) You offer these—all of it?

Mr. Jones: If not, I do offer it now in evidence.

The Court: Let the record show I, personally, read the deposition of Mr. Huletz and Mr. Kroll. In view of the fact it was not read into the record, and I went outside of the courtroom, let the record show it was offered.

Mr. Winter: That is all.

The depositions of August Buschmann, C. S. Leede, Ed Huletz and Gilbert M. Kroll, were filed, by order of the Court, and made a part of the record herein.

Mr. Jones: What was the last Exhibit?

The Clerk: No. 8, was the last one.

Mr. Jones: I offer No. 9, return of August Buschmann.



Mr. Winter: No objection except as to the relevancy and materiality, the same objection——

The Court: (Interrupting) The same ruling. I will admit them on the same theory.

Mr. Jones: That is the return of August Buschmann. [151]

Plaintiff's Exhibit No. 9, return of August Buschmann, admitted in evidence.

Mr. Jones: No. 10, return of Dr. Leede.

The Court: It will be admitted, subject to the same ruling.

Mr. Jones: No. 11, return of Gilbert M. Kroll.

The Court: It will be admitted, subject to the same objection and the same ruling.

Plaintiff's Exhibits Nos. 10, return of C. S. Leede, and 11 return of Gilbert M. Kroll admitted in evidence.

Mr. Jones: I have here the return of E. A. Huletz, the witness who testified that he instructed his accountant to put in the amount that he was advised was his profit and he said the return doesn't show it. Counsel probably would like to have the return for whatever it is worth.

The Court: It may be admitted.

Plaintiff's Exhibit No. 12, the return of E. A. Huletz, admitted in evidence.

Mr. Jones: Your Honor, I have the two witnesses I mentioned this morning,—Mr. Wayne, who is one of the principal stockholders and an officer of the Company, would, if here, testify, substantially, as did Mr. Braicks, the last witness on the

stand; Mr. Witherspoon, Vice President of the National Bank of Commerce, in Seattle, if here would testify in corroboration of Mr. Braicks' testimony, that Mr. Braicks did come to him about the time of this transaction, and told him he [152] wanted to be in a position, individually, to buy the interest of the stockholders of the old company that wanted to get out and not go on with the new and arranged for bank credit for that purpose.

The Court: Do you stipulate Mr. Witherspoon, if present, would so testify, Mr. Winter?

Mr. Winter: Well, I don't like to so admit, Your Honor. I have no way of knowing whether that would be his testimony or not; if I could have an opportunity to check it with Mr. Witherspoon and talk to him, I could tell as to whether or not he would say there was an agreement they could buy it up, individually, or whether or not it was his understanding it would be for the corporation. I have no way of knowing.

The Court: As I understood Mr. Braicks' testimony, the stockholders made arrangements for themselves to make the loan from the bank and divide the stock.

Mr. Jones: I would like to have the opportunity to present that testimony; if Counsel feels he wouldn't want to concede the witnesses would so testify, I would request my case be held open and I have permission to submit it; I feel I would hardly be justified in asking that regarding Mr. Witherspoon, possibly.

Mr. Winter: I think we will agree, if he were

present, he would so testify. Mr. Jones has always made that contention, both to the Agent and the Government he would so testify. I have no reason for denying it.

The Court: Without Mr. Witherspoon's testimony, assuming the Government has answering testimony, Mr. Braicks testified to that fact; Mr. Witherspoon's [153] testimony would be merely corroborative of Mr. Braicks' testimony.

Mr. Jones: That is true.

Mr. Winter: Our only chance would be to shake him on cross-examination and I doubt if it—we have no testimony contrary.

Mr. Jones: Would you concede Mr. Wonn, if here, would so testify, substantially as Mr. Braicks did?

Mr. Winter: Substantially, yes.

Mr. Jones: On those conditions, we rest.

Mr. Winter: We have no testimony, your Honor, except——

The Court: How do you spell Mr. Wonn's name?

Mr. Jones: W-o-n-n.

The Court: F. W. Wonn?

Mr. Jones: Yes, it is F. W. Wonn. He appears in the record as the Vice President of the Company, of the new Company.

Mr. Winter: Of course, we don't admit he reported any taxable profit on his return.

Mr. Jones: Have you got his return there?

Mr. Winter: Didn't Mr. Scott testify he represented him, he had his power of attorney?

Mr. Jones: I don't remember whether he did or not.

The Court: No, he testified as to Mr. Molz and Mr. Braicks, he didn't testify as to Mr. Wonn.

Mr. Winter: I think we can agree, that he did report on his return, without producing it but that he reported it as dividends and not as capital gain.

[154]

Mr. Jones: If that is your statement as to the fact, I will accept it, that is what it shows.

Mr. Winter: Yes.

Mr. Jones: All right, I will accept that.

Mr. Winter: I won't disclose anything in this record that is not already shown. (Reads excerpt from an exhibit in evidence.)

Mr. Jones: Shows '18 there—may have ordered a dividend, \$100.00; may have added to it.

The Court: May have owned some other stock some place?

Mr. Jones: Yes. I assume what Counsel means is he reported that dividends from the Pommerelle Company.

The Court: No, Domestic Corporation dividends.

Mr. Jones: Then that is probably the explanation of it.

The Court: Did you have any testimony?

Mr. Winter: No, Your Honor.

Mr. Jones: I don't know if Your Honor had a chance to read the Board of 'Tax Appeals' case?

The Court: No, but I would like to hear from you, as to the applicability of any of those cases.

Mr. Jones: All right. This is such a technical subject, I don't like to get too far off the tax in discussing it. (Further argument.)

The Court: Suppose they hadn't declared a dividend of these profits, they would have been subject to penalty under the undistributed profit tax.

Mr. Jones: That is right. [155]

The Court: If they can do what they did here—I think it is true there wasn't any deliberate effort on the part of these people to avoid a transaction from the undistributed profits tax; they wanted to solve some other tax problem and they have but if a corporation closely held by a small group do this, wouldn't it be possible for every corporation, where the stock is closely held, to avoid the undistributed profits tax by this mechanism?

Mr. Jones: I don't know whether I exactly follow?

The Court: Stockholders all around the country couldn't do this, but stock closely held, and if they wanted to avoid the payment of this——

Mr. Jones: (Interrupting) They weren't trying to avoid the payment of the undistributed profits tax.

(Further argument.)

The Court: I realize, so far as this particular act is concerned, it wasn't, primarily, a taxable measure. The theory is if you could adopt this tax law, it would solve some of our economic problems. The Congressional intent——

Mr. Jones: (Interrupting) It was a social-economic theory.

The Court: Now, if they hadn't, for the purpose of increasing their declared value, if they hadn't done that, just left the corporation as it was, they would either have had to have declared their undistributed profits in the form of dividends paid out to the stockholders, or paid a penalty tax for failure to do so. [156]

Mr. Jones: That is what they did.

(Further argument.)

The Court: So far as looking at it from the social-economic point of view, the belief was held at the time, if we could force these corporations to distribute their profits and get the money out—increase the purchasing power of the people, they would buy more goods, farm products—(I won't make a speech)——

Mr. Winter: (Interrupting) As dividends, as distinguished from capital gains.

The Court: So, when you got all through with this transaction, you had your new corporation, with your \$61,000.00 in it and there hadn't been any distribution of the profits of the corporation—there hadn't been any money put out to the people so they could buy more clothes and farm products and you pay a penalty for failure to do it.

Mr. Winter: I don't think I can add much except if the Court desires a further brief.—I will say this trial came on, on such short notice, I would like to have an opportunity to digest the later cases. (Further argument)—or, if Your Honor desires further authorities?



The Court: I don't know if I desire further authorities. I don't feel that these cases are controlling. I felt, in reading the cases of the 5th Circuit, Judge *Judge* Hutcheson's decision, or opinion, was a much better statement of what I thought the law was than the majority, but I don't think that that is controlling here, that those cases are directly or sufficiently in point here to be controlling. However, it is a technical matter and [157] I want to go over it further. If you want to file a further brief, I would be glad to get it next week, if I could.

Mr. Winter: I won't burden Your Honor with a great deal of *verbage*, I will see Your Honor gets it this week.

The Court: I don't think it is subject to collateral tax by the tax authorities.

(Further argument of Counsel.)

Mr. Jones: You say you don't think these cases are controlling. I appreciate, under the evidence, you can decide the case on the facts without reference to those cases. I was wondering whether you thought we misapprehended the legal point, and assuming that the question is one of law and to the extent it is one of law, there is, either one case of the 5th Circuit or other cases \* \* (Further Argument.)

The Court: You didn't have here a real liquidation, real dissolution; it was just simply the use of a mechanism which resulted in a new corporation, precisely the same as the old corporation and



resulted, incidentally, in the (at least, desirability) to avoid paying penalty tax on undistributed profits division. I don't think this question—Subdivision VIII—is of particular importance.

Mr. Jones: If you say there was no dispute of the resolution in liquidation, then that is not true; if you say it is all “sham and no substance”, then that might be true.

The Court: I don't say it is “sham and no substance.” I think, as I view the testimony, in good faith they attempted to follow the advice of their [158] Tax Counsel for the purpose of increasing their declared value but my present impression is, by so doing, they also took the step that resulted in the avoidance of the penalty tax; I don't think that it is possible to avoid payment of the penalty tax by this sort of mechanism.

Mr. Jones: Then I think if that is your view, it does get down to and will have to be governed by whichever line of those cases you choose to follow.

The Court: That is the reason I want to read them all over again.

(Adjournment) [159]

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

To the Clerk of the Above-Entitled Court:

Defendant, Thor W. Henriksen, Acting Collector of Internal Revenue for the District of Wash-

ington, hereby designates the entire record in this case to be contained in the record on appeal.

J. CHAS. DENNIS,

United States Attorney.

HARRY SAGER

Ass't United States Attorney.

THOMAS R. WINTER

Special Assistant to the Chief  
Counsel, Bureau of Internal  
Revenue.

Copy received this 6th day of Aug., 1942.

JONES & BRONSON

Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 8, 1942. [179]

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[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF CON-  
TENTS OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

Defendant, Thor W. Henricksen, Acting Collector of Internal Revenue for the District of Washington, having heretofore designated the entire record in this case to be contained in the record on appeal, more particularly designates this record as follows:

1. Complaint.
2. Answer.
3. Opinion.

4. Findings of Fact and Conclusions of Law.
5. Judgment.
6. Stipulation and Order Correcting Judgment.
7. Notice of Appeal.
8. Order extending time for Filing Record on Appeal and Docketing Action.
9. All exhibits.
10. Transcript of testimony taken at trial.
11. Defendant's Designation of Contents of Record on Appeal. [180]
12. This Supplemental Designation of Contents of Record on Appeal.

J. CHARLES DENNIS

United States Attorney.

HARRY SAGER

Assistant United States Attorney.

THOMAS R. WINTER

Special Assistant to the Chief  
Counsel for the Bureau of  
Internal Revenue.

Received copy this 19th day of Aug., 1942.

JONES & BRONSON

Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 20, 1942. [181]

In the United States District Court for the  
Western District of Washington,  
Southern Division

RECORD OF PROCEEDINGS:

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof, on the 25th day of August, 1942, the Honorable Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said Court, to-wit:

No. 189

[Title of Cause.]

MINUTE ORDER

On this 25th day of August, 1942, on motion of Thomas R. Winter, attorney for defendant, for an order to transmit the original exhibits admitted in evidence in the trial of this cause and for order to transmit the original depositions of August Buschmann, C. S. Leede, Ed Huletz and Gilbert M. Kroll, together with exhibits thereto attached, to the Circuit Court of Appeals, with the Transcript of the Record on Appeal herein,

It Is Ordered that the Clerk of this Court be and he is hereby directed to transmit to the Circuit Court of Appeals for the Ninth Circuit, with the Transcript of the Record on Appeal herein, the original exhibits in this cause, to-wit: Plaintiffs'

Exhibits Nos. 1 to 12, inclusive, and he is further directed to transmit the original depositions [182] of August Buschmann, C. S. Leede, Ed Huletz and Gilbert M. Kroll, together with exhibits thereto attached. [183]

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[Title of District Court and Cause.]

### STATEMENT OF POINTS

The appellant, Thor W. Henricksen, will rely upon the following points in the presecution of his appeal from the judgment of the United States District Court for the Western District of Washington, Southern Division:

#### I.

The District Court erred in entering judgment for the appellees and against the appellant for \$8,338.98 and interest; conversely, the Court erred in failing and refusing to enter judgment for the appellant dismissing appellees' suit, with costs.

#### II.

The District Court erred in finding and concluding that the Pommerelle Company, Inc. distributed its assets to its stockholders on October 4, 1937. Conversely, the Court erred in failing to hold that the assets of the Pommerelle Company, Inc. were transferred and conveyed by it directly to the newly organized Pommerelle Company.

III.

The District Court erred in failing and refusing to hold that the Pommerelle Company, Inc. was not entitled to a dividends paid credit for 1937 within the meaning of Section 27 of the Revenue Act of 1936 in that the transaction [184] in controversy constituted a non-taxable reorganization and not a liquidation of the Pommerelle Company, Inc.

J. CHARLES DENNIS,

United States Attorney.

HARRY SAGER,

Ass't United States Attorney.

THOMAS R. WINTER,

Special Assistant to the Chief  
Counsel, Bureau of Internal  
Revenue.

[Endorsed]: Filed Aug. 20, 1942. [185]

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD

I, Judson W. Shorett, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify and return that the foregoing Transcript of the Record on Appeal, consisting of pages numbered 1 to 185, inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in Cause No. 189,

W. Braicks and J. G. Molz, liquidating trustees of Pommerelle Company, Inc., a corporation, Plaintiffs and Appellees, vs. Thor W. Henricksen, Acting Collector of Internal Revenue, Defendant and Appellant, as required by the Designation and Supplemental Designation of the Defendant-Appellant of the Contents of the Record on Appeal, on file and of record in my office at Tacoma, Washington, the same constituting the Transcript of the Record on Appeal from the Judgment of the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that original exhibits, numbered as follows, to-wit: Plaintiffs' Exhibits Nos. 1 to 12, inclusive, are transmitted herewith, pursuant to order of the District Court herein; that original depositions of August Buschmann, C. S. Leede, Ed Huletz and Gilbert M. Kroll, together with exhibits attached thereto, are herewith transmitted, pursuant to order of the District Court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, at the City of Tacoma, State of Washington, this 26th day of August, 1942.

[Seal]

JUDSON W. SHORETT,

Clerk.

By E. REDMAYNE,

Deputy.

[Endorsed]: Filed Aug. 20, 1942.



[Endorsed]: No. 10233. United States Circuit Court of Appeals for the Ninth Circuit. Thor W. Henricksen, Acting Collector of Internal Revenue, Appellant, vs. W. Braicks and J. G. Molz, Liquidating Trustees of Pommerelle Company, Inc., a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed August 28, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10233

W. BRAICKS and J. G. MOLZ, liquidating trustees of POMMERELLE COMPANY, INC., a corporation,

Appellees,

vs.

THOR W. HENRICKSEN, Acting Collector of  
Internal Revenue,

Appellant.

APPELLANT'S STATEMENT OF POINTS  
AND DESIGNATION OF RECORD FOR  
PRINTING

Comes now Thor W. Henricksen, Acting Collector of Internal Revenue, appellant above named,

and for his Statement of Points upon which he intends to rely on this appeal adopts the Statement of Points filed by him in the District Court in connection with his Notice of Appeal and included in the transcript of record prepared and certified by the Clerk of said District Court at page 37 thereof; and appellant designates the entire transcript of the record as prepared and certified by the Clerk of said Court as necessary for consideration of this appeal.

J. CHARLES DENNIS

HARRY SAGER

THOMAS R. WINTER

Attorneys for Appellant.

[Endorsed]: Filed Aug. 31, 1942.

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[Title of Circuit Court of Appeals and Cause.]

#### STIPULATION FOR SUPPLEMENTAL DESIGNATION OF RECORD FOR PRINTING

It is hereby stipulated by and between the appellant and the appellees that the following portions of the exhibits be printed:

1. Letters of February 15, 1938, and February 16, 1938, to August Buschmann, Pommerelle Company (Exhibit attached to original deposition marked by reporter as Exhibit 1.)
2. Plaintiff's Exhibit 1, Ninety-day letter (Reporter's original transcript, page 24).

3. So-called liquidating statement, together with the list of stockholders and the amounts of so-called liquidating dividends distributed to them (Attached to Plaintiff's Exhibit 2) (Reporter's original transcript, page 25).

4. All minutes, subscriptions and records appearing in Plaintiff's Exhibit 5 from September 26, 1937, to October 4, 1937, inclusive (Reporter's original transcript, page 29).

5. All minutes, subscriptions and records except Articles of Incorporation and By-Laws appearing in Plaintiff's Exhibit 6, from date of incorporation to October 4, 1937, inclusive. (Reporter's original transcript, page 31).

6. Plaintiff's Exhibit 7, statement of witness Scott (Reporter's original transcript, page 50).

7. This stipulation.

It is further stipulated that Plaintiff's Exhibits 8, 9, 10, 11, and 12, being photostat copies of income tax returns of stockholders, A. Vanderspek, August Buschmann, C. S. Leede, Gilbert M. Kroll and E. A. Huletz for the year 1937 show that these stockholders reported on their returns the amount of the so-called liquidating dividends shown in Plaintiff's Exhibit 7 and for that reason are not necessary for consideration of this appeal except as to that fact.

It is further stipulated that the other original exhibits on file being Plaintiff's Exhibits 3 and 4 are in most respects not of a printable character and may be inspected by the Court without the

necessity of printing. Application is therefore made for such inspection without printing.

J. CHAS. DENNIS

HARRY SAGER

THOMAS R. WINTER

Attorneys for Appellant

JONES & BRONSON

H. B. JONES

Attorneys for Appellees

[Endorsed]: Filed Sep. 16, 1942.